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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. [redacted] /

THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA & ARKANSAS RAILWAY COMPANY, et al.,

Appellants,

versus

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION.

Brief for New Orleans Joint Traffic Bureau, Board of Trade of Kansas City, Mo., Grain Dealers Association of Oklahoma, Oklahoma Millers Association, The St. Joseph Grain Exchange, Omaha Grain Exchange, Atchison Board of Trade, Terrell Chamber of Commerce, and Monroe Traffic Bureau, Appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 24

THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA & ARKANSAS RAILWAY COMPANY, et al.,

Appellants,

versus

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION.

Brief for New Orleans Joint Traffic Bureau, Board of Trade of Kansas City, Mo., Grain Dealers Association of Oklahoma, Oklahoma Millers Association, The St. Joseph Grain Exchange, Omaha Grain Exchange, Atchison Board of Trade, Terrell Chamber of Commerce, and Monroe Traffic Bureau, Appellants.

STATEMENT.

This is a suit to enjoin various orders of the Interstate Commerce Commission, hereinafter referred to as the Commission, which prohibit as unduly preferential of the Louisiana ports and unduly prejudicial of the Texas ports the

equalization of New Orleans and other Louisiana ports with Galveston and other Texas ports in respect of export, import and coastwise freight rates maintained between said ports and interior points in Texas, Oklahoma and Kansas, the distance from which to New Orleans exceeds that to Galveston by more than 25 per cent.

The bills to enjoin were filed below (R. 3-190) by four of the defendants before the Commission, *i. e.*, the Texas & Pacific Railway Company, Louisiana & Arkansas Railway Company, Louisiana Railway & Navigation Company and Louisiana Railway & Navigation Company of Texas, these lines running northwest from New Orleans through the State of Louisiana into Texas and being hereinafter referred to as the New Orleans or Louisiana port lines.

Upon motion, the appellants, on whose behalf this brief is written, were permitted to intervene below in support of the bills for injunction. (R. 260-8, 272.)

The said appellees were all parties to the case before the Commission, having there intervened in opposition to the complainants. Their interest in this case is substantial. The losses they will suffer if the Commission's orders are valid are enormous.

Those appellants who are interior shippers will be deprived of the opportunity for a choice of routes for the carriage of their commerce to or from foreign ports, except by the payment of a substantial penalty when the port of New Orleans is used.

The port of New Orleans will find itself in the position of a second or third-rate port if the principles announced by the Commission in the instant cause are carried to their logical conclusion. Mobile, Ala., and other ports on the more easterly shore of the Gulf of Mexico are somewhat closer to the interior southeast. To the west is Lake Charles, La., and beyond Lake Charles the Texas ports.

There is left but a small section of the interior directly North of New Orleans from whence the distances are shorter than to other competing ports. The State of Louisiana has invested millions of dollars in public funds in water-front facilities at the Louisiana ports. If artificial rate barriers are to be placed in the way of foreign and coastwise commerce so as to compel the movement through the port which is nearest to the inland origin or destination, as the case may be, such facilities are virtually useless. These observations are offered at the beginning of this brief to explain the intense interest which the appellants on whose behalf this brief is written have in this cause.

In the lower court the complainants in the proceedings before the Commission and numerous commercial organizations interested in the Texas ports intervened in opposition to the bills and in support of the orders sought to be enjoined. (R. 225-31.)

There also intervened below, in opposition to the bills and in support of the Commission's order, the Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas, The Trinity and Brazos Valley Railway Company, Gulf Colorado and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, and The Atchison, Topeka and Santa Fe Railway Company. (R. 233-4.) These lines were also named as defendants in the proceedings before the Commission. They operate lines of railroad running in a northerly direction from the Texas ports through the States of Texas, Oklahoma and into Kansas, and are hereinafter referred to as the Texas port lines.

Reference to official reports of opinions delivered in the court below.

The District Court, constituted pursuant to the provisions of United States Code, Title 28, Section 47, declined, by final decree, to set aside, annul or suspend the orders of the Commission sought to be enjoined, Foster, circuit judge, dissenting. (R. 3582-3.) The written opinions of the lower court appear in the printed record at pages 3571 to 3582, and are reported in 42 Fed. (2nd) 281.

Jurisdiction.

Pursuant to the provisions of United States Code, Title 28, Section 47, a direct appeal from said final decree was taken to this court on July 10, 1930. (R. 3599.)

Paragraph 1 of Rule 12 has been complied with and this court entered an order on March 23, 1931, that probable jurisdiction had been shown.

Proceedings before the Commission.

In the brief contemporaneously being filed in this Court on behalf of the appellants, the Texas & Pacific Railway and the other Louisiana port carriers, is contained a full and complete description of the various proceedings before the Commission which led up to the entry of the orders here sought to be enjoined. To conserve the time of the Court by avoiding mere duplication, we do not present a similar recital but shall refer to the proceedings before, and the reports and orders entered by, the Commission only to the extent necessary to make clear the terms we use and the grounds suggested as reasons for a reversal.

The complaint before the Commission was originally brought solely on behalf of the port of Galveston, Texas,

and, as amended at the original hearing, assailed as prejudicial to Galveston and preferential of New Orleans, La., and Mobile, Ala., the export, import and coastwise rates maintained by rail carriers between said ports and interior points lying west of the Mississippi River, but including points in Illinois. (R. 3348.) The gravamen of the complaint was the policy followed for several decades by the Louisiana port carriers and their Southwestern connections of maintaining for longer distances to and from New Orleans the same export, import and coastwise rates as were contemporaneously maintained by the Texas port carriers for shorter distances to and from Galveston and the other Texas ports. This policy and the resulting rate structure is referred to as port equalization.

The other Texas ports of Texas City, Houston, Beaumont, Orange and Port Arthur intervened on behalf of the complainant, seeking a like measure of relief, and all these will be hereinafter referred to as the Texas ports.

In its first report on June 24, 1925, reported in 100 I. C. C. 110 (R. 3346-66), hereinafter referred to as the *1925 report*, the Commission made the following finding (R. 3361-2):

> "We find that the present relationships of the assailed rates on export, import, and coastwise traffic, in carloads, from or to points in Louisiana west of the Mississippi River, Arkansas, Texas, Oklahoma, and Kansas south of the main line of the Union Pacific from Kansas City to the western boundary of the state, hereinafter referred to as southern Kansas, are unduly prejudicial to Galveston and unduly preferential of New Orleans. We further find that this undue prejudice should be removed by establishing the same rates to or from New Orleans or Galveston, as the case may be, in instances where the differences in distance from and to the two ports are not greater than 100 miles, and by establishing rates to or from Galveston, as the case may be, the following differentials under New Orleans in instances where the differences in distance in favor of Galveston are greater than 100 miles."

Then follow the minimum differentials specified on specific commodities.

In its *1925 report* the Commission specifically noted that the measure of the rates to or from Galveston and New Orleans was not in issue, that there was no evidence upon which an opinion in regard to rate level might be based, and that, accordingly, the method of removing the undue prejudice found to exist would be left to the carriers. (R. 3363.)

The case was reopened, further testimony was taken and on June 29, 1927, the Commission issued its second report, reported in 128 I. C. C. 349 (R. 3367 to 3436), hereinafter referred to as the *1927 report*, which in a large measure affirmed the *1925 report*. However, three modifications in the findings and order were made: First, it was found that, since the Louisiana port lines, appellants here, did not control the assailed rates to or from the Texas ports, they could not be held guilty of undue prejudice and preference, and they were consequently exempted from the orders (R. 3406, 3416-7); secondly, the Commission exempted rates on petroleum from the order which as to other commodities condemned port equalization as occasioning undue preference and prejudice (R. 3418-9); and third, instead of a 100-mile leeway for difference in distance within which port equalization would be permitted, the Commission substituted 25 per cent of the distance to Galveston. (R. 3415-7.) Territory from whence the distances to New Orleans exceed the distances to Galveston by more than 25 per cent is hereinafter referred to as differential territory.

An order responsive to the findings was entered (R. 76-84), which directed the defendants to cease and desist from maintaining export, import and coastwise rates from or to Galveston "which reflect relationships with the contemporaneous rates from or to New Orleans, La., different from

those prescribed in the next succeeding paragraphs hereof." In the next succeeding paragraphs the defendants were directed to publish on specified commodities to or from points in differential territory, excluding points on the lines of the Louisiana port carriers, export, import and coastwise rates from or to Galveston which should be less than the corresponding rates contemporaneously maintained from or to New Orleans by certain specified differentials.

Subsequent to its *1927 report* the Commission again reopened the case for further hearing, primarily for the purpose of determining whether the Texas & Pacific and the other Louisiana port lines should be exempted from the Section 3 order. Further hearings were had and on December 23, 1929, the Commission issued its third report, reported in 160 I. C. C. 345 (R. 3438 to 3459), hereinafter referred to as the *1929 report*, in which it expanded its previous order so as to include on the same terms the export, import and coastwise rates maintained by the Texas & Pacific and other Louisiana port lines between points on their lines and New Orleans.

Specifically the Commission found that the existing relationship of the rates on import, export and coastwise traffic (equalization of New Orleans with the Texas ports), "from or to points in Texas on the lines of the Texas & Pacific and the Louisiana Railway & Navigation Company of Texas are, and for the future will be, unduly prejudicial to Galveston and the other Texas ports taking the same rates, and unduly preferential of New Orleans." (R. 3456.) The Commission directed that the undue prejudice should be removed (R. 3456),

> "by establishing from or to interior points from which the short-line distances to New Orleans exceed those to Galveston by more than approximately 25 per cent, rates to or from Galveston and other Texas ports tak-

> ing the same rates, as the case may be, which do not exceed rates which are less than the contemporaneous rates on the same commodities to or from New Orleans by the differentials prescribed on the respective commodities named on pages 389 and 390 of the previous report, the distances to or from the respective ports of Galveston and New Orleans to be determined in the manner prescribed in that report''

and an order making effective this finding was duly entered, using phraseology similar to that used in the *1927 order.* (R. 87-92.)

It will be noted that the finding and order prescribed for neither Galveston nor New Orleans any specific rate level. The order is alternative in form in that it could be made effective by either one of two means, (1) by the Texas port lines reducing their rates between interior points and the Texas ports by such amounts as would be necessary to accomplish the required differentials, or (2) by the Louisiana port lines increasing their rates by amounts sufficient to make effective the same differentials.

When this cause is argued a motion will be made to supply for the record rate tabulations, supported by certified copies of tariffs, showing that, with a few unimportant exceptions, the second of these two methods was the one adopted.

With the 1929 case was consolidated a complaint of the Cooper Grocery Company assailing as unreasonable under Section 1 of the Act rates on green coffee from New Orleans to Waco, Texas, and under Section 3 of the Act the same rates in their relationship to rates on green coffee from New Orleans to Dallas and Fort Worth, Texas. (I. C. C. Docket 20685.) The Commission found that the assailed rate was not unreasonable but that it was unduly prejudicial to the extent that it exceeded the rate contemporaneously applied on the same commodity from New Orleans, La., to Dallas and Fort Worth, Texas. (R. 3456-7.)

Proceedings in the lower court.

The bills filed inthe lower court asserted that the *1925, 1927** and *1929 orders* of the Commission are void and should be set aside. The grounds there specified for asserting the invalidity of the orders are recited in some detail in the assignment of errors.

At the hearing in the lower court the appellants presented, in support of their bills, a complete narrative statement of all the evidence received by the Commission, and in addition exhibits containing certified copies of the pleadings before, and reports and orders of, the Commission.

On June 24, 1930, the lower court entered its order dismissing the bills (R. 3582-3), the grounds therefor being stated in the opinion of the court written by Hutcheson, J., with Foster, C. J., dissenting. (R. 3571-82.)

Specification of Errors.

All of the appellants joined in bringing their appeals, in assigning twenty-eight numbered errors to the action of the lower court. Of the twenty-eight, the following will be argued by the appellants on whose behalf this brief is written:

> "6. The District Court erred in failing and refusing to hold and find that none of the said above orders of the Interstate Commerce Commission was supported by any substantial evidence and in failing and refusing to find, as a matter of fact, that the evidence in the record established beyond a doubt that the rate adjustment complained of did not make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, and did not subject any particular person, company, firm, corporation or locality, or any partic-

*The *1927 order* was substituted for the *1925 order*, and in our argument below reference to the *1927 order* should be understood as also embracing the *1925 order*.

ular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

7. The District Court erred in failing and refusing to hold that the Commission's orders set forth in the bills of complaint herein, and sought to be annulled and set aside, are unsupported by evidence and invalid.

8. The District Court erred in failing and refusing to hold that the orders set forth in the bills of complaint herein, and sought to be annulled and set aside, were without any evidence to support same and are beyond the powers of the Commission to make.

10. The District Court erred in failing and refusing to hold the Commission's said orders void because the Commission had exceeded its powers, had proceeded upon an erroneous theory of law, and its action is manifestly arbitrary and unreasonable and transcends the authority conferred upon it by law, and the same should have been set aside and annulled by the Court.

13. The District Court erred in failing and refusing to hold the Commission's said orders void for the following reasons:

(a) Said orders ignore the element of actual carrier competition.

(b) Said orders are based merely upon differences in distance of rail-haul to and from gulf ports.

(c) Said orders ignore all transportation conditions between inland points and foreign or coastwise points other than mere differences in distance of rail-haul.

(f) Said orders of the Commission were arbitrarily designed to offset commercial disadvantages inherent in the handling of export, import, and coastwise traffic through the Texas ports, and to compel shippers and receivers of freight to use the Texas ports and the lines of carriers serving the Texas ports or else to pay penalties in the form of differentially higher freight rates for transportation over the lines of carriers serving New Orleans.

(h) The reports of the Commission upon which said orders are based show upon their face that the orders of the Commission were arbitrary and void, as the facts therein stated show that the purpose of the Commission in making said orders was to arbitrarily divert traffic from the lines of the carriers serving the port of

New Orleans to the lines of carriers serving the Texas ports.

(i) Neither The Texas and Pacific Railway Company nor the Louisiana & Arkansas Railway Company, the Louisiana Railway & Navigation Company, nor the Louisiana Railway & Navigation Company of Texas (now the Louisiana, Arkansas & Texas Railway Company), are responsible for rates from points on their lines to Texas ports, and neither The Texas and Pacific Railway Company nor the Louisiana & Arkansas Railway Company, the Louisiana Railway & Navigation Company, nor the Louisiana Railway & Navigation Company of Texas (now the Louisiana, Arkansas & Texas Railway Company), reach any of the Texas ports over their own rails, and therefore said carriers can not be guilty of a violation of Section 3 of the Interstate Commerce Act in maintaining the same rates to New Orleans on foreign and coastwise traffic as are contemporaneously maintained by carriers from the same points of origin to the Texas ports.

(j) The Commission has laid down a rule for general application permitting circuitous routes of rail carriers to meet routes of short-line competing carriers between points of origin and destination throughout southwestern territory, which rule is substantially more liberal than that prescribed in the instant cases. Carrier competition exists as to foreign and coastwise traffic in no less degree between gulf ports and interior points on the lines of rail carriers under Section 3 of the Act than exists between points in southwestern territory under Section 4 of the Act. The adoption of a different rule without any difference in transportation conditions is arbitrary and void.

14. The District Court erred in failing and refusing to hold the said Commission's orders void, because the effect of said orders is to deprive carrier petitioners of their right to meet the competition of other carriers serving the ports of Texas on export, import and coastwise business moving through the port of New Orleans, the effect of said orders being to deprive said carrier petitioners of their right to enjoy export, import, and coastwise traffic originating on and destined to points on their lines and on the lines of their connections in

competition with other rail carriers serving the same territory and enjoying the same traffic moving through the Texas ports.

15. The District Court erred in failing and refusing to hold said orders void and in holding that the carrier petitioners herein and/or connecting lines of railway could be and are guilty of discrimination and undue prejudice under Section 3 of the Interstate Commerce Act, even though their lines do not reach both the port of New Orleans and the Texas ports, and in holding that said carrier petitioners herein and/or their connections would be and are guilty of discrimination and undue prejudice in maintaining an equality or parity of rates on export, import and coastwise business moving through the port of New Orleans or the Texas ports, the record in these cases establishing beyond a doubt that said carrier petitioners here and their connections earned a reasonable profit upon the movement of export, import, and coastwise traffic from and to interior points on their respective lines for the distance provided in said orders, and that no burden was fixed upon other traffic on account of carrier petitioners and/or their connections maintaining such parity or equality of rates as between the Texas ports and the port of New Orleans.

16. The District Court erred in finding in substance that, as the record in the cases before the Commission was voluminous, and as the Commission had been painstaking in taking evidence in said causes, and as the Commission was better qualified to pass upon the question of rates than the Court, the Court would not attempt to substitute its administrative judgment for that of the Commission. Whether the rate in these particular causes is reasonable or unreasonable was not in question, it being conceded by all parties that the rate in itself is a reasonable rate. The only question involved was whether or not a reasonable rate and the same rate to the ports of Texas and the port of New Orleans on export, import, and coastwise business could create and did create or give any undue or unreasonable preference or advantage in favor of the port of New Orleans as against the Texas ports. The record establishes beyond a doubt that the traffic involved, to wit, export, import, and coastwise, does

not stop at either the Texas ports or the port of New Orleans, but merely passes through in order to reach its final destination. It was not necessary for the Court to pass upon the weight of the evidence. It was necessary, however, for the Court to find and say whether or not there was substantial evidence to support the Commission's orders and not to accept the Commission's findings and conclusions as binding upon the Court, regardless of what the evidence established.

The findings of the Commission as to what the evidence discloses lead to but one conclusion, and that is that there was no substantial evidence to support the complaint of undue prejudice and unjust discrimination under Section 3 of the Interstate Commerce Act. The evidence, as shown by the reports of the Commission herein, and upon which it bases its orders, shows conclusively that no such discrimination or prejudice existed. The record disclosed beyond a doubt, and the finding of the Commission based upon this evidence is unquestioned, that a parity of rates upon export, import, and coastwise business between the Texas ports and the port of New Orleans has existed for a long period of years; that under a parity of rates the Texas ports have prospered to a much greater degree and have grown to a much greater extent than the port of New Orleans; that the effect of a parity of rates has not inflicted any injury or imposed any disadvantage upon the Texas ports. A prejudice that does no harm, that creates no injury, but, as the facts in the record show, creates a commercial benefit, is not a violation of Section 3 of the Interstate Commerce Act.

The District Court erred, therefore, in not holding that the conclusions of the Commission, based upon the evidence in this record, are not borne out or sustained by the admitted facts as set forth by the Commission in its own reports and supported by the evidence in the record.

18. The District Court erred in failing and refusing to hold the Commission's said orders void because they were based upon a mistake of law. What Congress sought to prevent by Section 3 was not differences between localities in transportation rates, facilities, and privileges, but unjust discrimination between them by the same carrier or carriers; that said orders are void

in that the facts in these causes show that petitioners' lines of road reach only the port of New Orleans; that the rates in effect over their lines of road on export, import, and coastwise traffic are the same rates that are carried if the traffic moves through the Texas ports, or, in other words, an equality of rates; that the traffic originates at the same point and ends at the same point whether it moves through the Texas ports or the port of New Orleans, and the rates are admitted to be reasonable. The evidence discloses, and the Commission so finds, that the ocean rates on this traffic are generally the same at each of the gulf ports so that the sum of the rail rates and the ocean rates creates a parity of the through rate via all of the ports. This conclusively establishes the fact that no undue preference or prejudice exists under Section 3 of the Act.

22. The District Court erred in holding that the findings of the Commission as shown by their reports supported the orders, when, as a matter of fact and as shown by the record, the findings and reports of the Commission utterly fail to support the orders, in that they fail to show any undue or unreasonable preference or advantage to the port of New Orleans or any undue or unreasonable prejudice or disadvantage to the ports of Texas. On the contrary, the Commission in its findings and reports shows that the ports of Texas have prospered and grown under a parity of rates and to a much greater extent than the port of New Orleans and the conclusion of the Court is not supported by the facts as found by the Commission, and the Court erred in so holding.

23. The Bills of complaint filed herein attacked said orders on the ground that they would not permit carrier petitioners to enjoy export, import, and coastwise traffic tributary to their lines, and to the lines of their connections for the reason that the purpose and effect of the orders was to divert all of said traffic to competing railroad lines serving the Texas ports; that the effect *to* these orders was to deprive carrier petitioners of the use of their property and the enjoyment of same, and said orders violated the Fifth Amendment to the Constitution of the United States, in that they deprive said petitioners of their properties without due process of law. The Court, in its opinion, utterly ig-

nored this complaint and failed to make any finding upon same, and in this the Court erred, as the undisputed facts in the record and the reports and findings of the Commission, as disclosed by the record, show that the intent and effect of these orders will be to divert all or practically all of this traffic from the port of New Orleans to the Texas ports; that these petitioners have no rail lines into the Texas ports and will be deprived of the movement of such traffic originating at and destined to points on their respective lines, and on the lines of their connections."

SUMMARY OF POINTS AND AUTHORITIES.

I.

The order of the Commission will be enjoined and set aside:

(a) If the action of the Commission, while in form within its delegated power, is exercised in such an arbitrary and unreasonable manner as to transcend the legitimate bounds of its authority.

Interstate Commerce Commission v. *Illinois Central R. R. Co.*, 215 U. S., 452, 470; 54 L. Ed. 280, 287.

Interstate Commerce Commission v. *Union Pacific R. Co.*, 222 U. S., 541, 547; 56 L. Ed., 308, 311.

Southern Pacific Co. v. *Interstate Commerce Commission*, 219 U. S., 433; 55 L. Ed., 283.

(b) If the action of the Commission is based on an erroneous construction of the statute.

Interstate Commerce Commission v. *Illinois Central R. R. Co.*, 215 U. S., 452, 470; 54 L. Ed., 280, 287.

Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S., 541, 547; 56 L. Ed., 308. 311.

United States of America v. *Chicago, Milwaukee St. P. & P. R. R. Co.*, 75 L. Ed. Adv. Ops., 142; 282 U. S., 311.

United States v. *Missouri Pacific R. Co.*, 278 U. S., 269; 73 L. Ed., 322.

Baltimore & Ohio R. Co. v. *United States*, 277 U. S., 291; 72 L. Ed., 885.

Central Railroad Co. v. *United States*, 257 U. S., 247; 66 L. Ed., 217.

Ann Arbor Railroad Co., v. *United States*, 281 U. S., 658; 74 L. Ed., 1098.

(c) If the order of the Commission is not supported by evidence which shows a violation of the law by the carrier sought to be found guilty.

Interstate Commerce Commission v. *Illinois Central R. R. Co.*, 215 U. S., 452, 470; 54 L. Ed., 280, 287.

Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S., 541, 547; 56 L. Ed., 308, 311.

Baltimore & Ohio R. Co. v. *United States*, 277 U. S., 291; 72 L. Ed. 885.

Central Railroad Co. v. *United States*, 257 U. S., 247; 66 L. Ed., 217.

Florida East Coast R. Co. v. *United States*, 234 U. S., 167; 58 L. Ed., 1267.

(d) If the order of the Commission is not supported by appropriate findings of ultimate facts which show a violation of the law.

Brimstone R. & C. Co. v. *United States*, 276 U. S. 104; 72 L. Ed., 487.

Florida v. *United States*, 75 L. Ed. Adv. Ops., 212.

II.

In entering both its 1927 and 1929 orders, the Commission acted arbitrarily and in a manner to transcend the legitimate bounds of its authority in that its orders, while in form directed to regulation of freight rates, in reality are directed (1) to the establishment of an arbitrary rate structure for the purpose of overcoming the assumed commercial and economic advantages of the Louisiana ports,

and (2) to the diversion of tonnage from one through rail-and-ocean route to another through rail-and-ocean route. Such orders are arbitrary, exceed the statutory power of the Commission, and, therefore, void.

I. & S. 3473, *Blackstrap Molasses from Louisiana Points to Kansas and Oklahoma*, 171 I. C. C. 583.

I. & S. 3429, *Blackstrap Molasses from Louisiana Ports to Kansas and Oklahoma*, 171 I. C. C. 591.

I. C. C. v. Diffenbaugh, 222 U. S., 42; 56 L. Ed., 83.

Ellis v. *Interstate Commerce Commission*, 237 U. S., 434, 445; 59 L. Ed., 1036, 1041.

Western Oregon Lumber Mfrs. Asso. v. *S. P. Co.* (*Willamette Valley Rate Case*), 14 I. C. C. 61.

Southern Pacific Co. v. *I. C. C.*, 219 U. S., 433; 55 L. Ed., 283.

Anchor Coal Co. v. *U. S.*, 25 Fed. (2d) 462; (reversed on other grounds, 279 U. S., 812; 73 L. Ed., 971).

Atchison, T. & S. F. Ry. Co. v. *I. C. C.*, 190 Fed., 591.

III.

In entering both its 1927 and 1929 orders, the Commission acted arbitrarily, and without regard to its statutory duty, in that it failed to give consideration to the fact that competition of competing through rail-and-ocean routes, via which an equality of charges and conditions prevailed, justified the equalization of the inland rail rate factors.

Texas & Pacific Ry. Co. v. *Interstate Commerce Commission*, (*Import Rate Case*), 162 U. S., 197, 205, 207, 220, 233, 234; 40 L. Ed. 940, 942, 943, 947, 952.

New York Board of Trade & Transportation v. *Pennsylvania R. R. Co.*, 3 I. C. Rep. 417; 4 I. C. C. Rep. 447.

Interstate Commerce Commission v. *B. & O. R. R. Co.*, 145 U. S. 263, 284; 36 L. Ed. 699, 706.

Londonderry Port and Harbour Commissioners v. *The Great Northern Ry. Co. (Ireland), et al.*, 5 Ry. & Can. Traf. Cas., 282, 284, 293.

Dublin and Manchester Steamship Co. v. *London and North-Western Ry. Co.*, 15 Ry. & Can. Traf. Cas., 88, 95, 96, 99, 100.

Phipps v. *London & N. W. R. Co.*, 8 Ry. & Can. Traf. Cas., 83; (1892), 2 Q. B. 229.

IV.

The 1927 and 1929 orders are not supported by evidence which shows that the equalization of competing ports in respect of export, import and coastwise rates results in preference and prejudice which is undue.

An equalized export, import and coastwise, rate structure does not violate Section 3 of the Act so long as (1) the rate to the nearer port is not in excess of a maximum reasonable rate, (2) the equalized rate to the more distant port is not so low as to cast a burden on other traffic, and (3) the equalization is necessary if the carriers serving the more distant port are to compete for the through traffic in respect of which the ports are but junction points between rail and ocean carriers.

Philadelphia & Reading Ry. Co. v. *United States*, 240 U. S., 334; 60 L. Ed., 675.

Interstate Commerce Commission v. *Baltimore & Ohio R. Co.*, 145 U. S., 263, 276; 36 L. Ed., 699, 703.

Interstate Commerce Commission v. *Alabama M. R. Co.*, 168 U. S., 144, 164; 42 L. Ed., 414, 422.

Interstate Commerce Commission v. *Louisville & N. R. Co.*, 73 Fed., 409, 424.

Louisville & Nashville R. Co. v. *Behlmer*, 175 U. S., 648, 671; 44 L. Ed., 309, 318.

East Tennessee, Virginia & Georgia R. Co. v. *Interstate Commerce Commission*, 181 U. S., 1; 45 L. Ed., 719.

Texas & Pacific Ry. Co. v. *Interstate Commerce Commission, (Import Rate Case)*, 162 U. S., 197; 40 L. Ed., 940.

Londonderry Port and Harbour Commissioners v. *The Great Northern Ry. Co., (Ireland), et al.*, 5 Ry. & Can Traf. Cas., 282.

Dublin and Manchester Steamship Co. v. *London and North-Western Ry. Co.*, 15 Ry. & Can. Traf. Cas., 88.

Oklahoma Corporation Commission v. *A. & S. Ry. Co.*, 98 I. C. C., 183, 263.

Oklahoma Corporation Commission v. *A. & S. Ry. Co.*, 101 I. C. C., 116.

I. & S. 2595, Meats and Packing-House Products, 136 I. C. C., 651, 661-670, 675.

Fourth Section Application 2040, Export and Import Rates, to and from South Atlantic and Gulf Ports, 169 I. C. C., 13, 32, 40, 43.

V.

The Louisiana port carriers neither serve with their own rails any of the Texas ports, nor have they any controlling voice in fixing the level of the assailed rates thereto or therefrom; and the maintenance by them of the same rates on shipments of foreign and coastwise traffic from or to interior points on their line to or from the Louisiana ports served by them as are contemporaneously maintained on like traffic from or to the same interior points to or from the Texas ports by competing Texas port carriers, does not, as a matter of law, result in a violation of Section 3 of the Interstate Commerce Act.

The Commission in the 1929 order in this case, in attempting to control the rates of the Louisiana port carriers through the guise of the Section 3 order, alternative in form but not in fact, transcended the legitimate bounds

of its authority, and therefore, the order is void and should be enjoined.

Interstate Commerce Act, 1887, Section 3 (1).

Railway and Canal Traffic Act, 1854, (English), (17 & 18 Vict. c. 31).

Interstate Commerce Commission v. *Baltimore & O. R. Co.*, 145 U. S., 263, 284; 36 L. Ed., 699, 706.

Hozier v. *Caledonian R. Co.*, (1855), 17 Sess. Cas. 302, 1 Ry. & Can. Traf. Cas., 27.

Caterham Railway Co. v. *London, Brighton and South Coast Ry. Co.*, (1857), 87 E. C. L. R., 409, 1 C. B. (N. S.), 410.

Foreman v. *Great Eastern Ry. Co.*, (1875), 2 Ry. & Can. Traf. Cas., 202, 206.

Richardson v. *Midland Railway Co.*, (1881), 4 Ry. & Can. Traf. Cas., 1.

Dublin Steam Packet Co. v. *London and North Western Ry. Co.*, (1881), 4 Ry. & Can. Traf. Cas., 10, 18.

Liverpool Corn Traders' Assn. v. *Great Western Ry. Co.* (1892), 8 Ry. & Can. Traf. Cas., 114.

Pickering Phipps v. *London and North Western Ry. Co.*, (1892), 8 Ry. & Can. Traf. Cas., 83, 107.

Plymouth Incorporated Chamber of Commerce v. *Great Western Ry. Co., et al.*, (1895), 9 Ry. & Can. Traf. Cas., 72, 85.

Lever Brothers, Limited v. *Midland Ry. Co.*, (1909), 13 Ry. & Can. Traf. Cas., 301, 304, 312.

Crews v. *The Richmond & Danville R. R. Co.*, 1 I. C. C., 401, 415.

Eau Claire Board of Trade v. *C. M. & St. P. Ry. Co.*, 5 I. C. C., 264, 295.

Chicago Lumber & Coal Co. v. *T. S. Ry. Co.*, 16 I. C. C., 323, 332.

Ashland Fire Brick Co. v. *S. Ry. Co.*, 22 I. C. C., 115, 119, 120.

Central Railroad Co. of N. J. v. *United States*, 257 U. S., 247, 257, 258; 66 L. Ed., 217, 221.

United States v. *Illinois Central R. R. Co.*, 263 U. S., 515; 68 L. Ed., 417.

Wichita Motors Co. v. *A. & V. Ry. Co.*, 88 I. C. C., 152.

National Car Coupler Co. v. *B. & O. R. R. Co.*, 88 I. C. C., 325.

Valley Camp Coal Co. v. *B. & O. R. R. Co.*, 88 I. C. C., 682, 686.

United Verde Extension Mining Co. v. *A. T. & S. F. Ry. Co.*, 89 I. C. C., 95.

Lake Dock Coal Cases, 89 I. C. C., 170.

Salt Cases of 1923, 92 I. C. C., 388.

Maritime Association of Boston Chamber of Commerce v. *A. A. R. R. Co.*, 95 I. C. C., 539, 572.

Maxwell Motor Corp. v. *B. & O. R. R. Co.*, 100 I. C. C., 363.

Lake Cargo Coal Rates, 1925, 101 I. C. C., 513; 126 I. C. C., 309, 340, 364.

Union Bag & Paper Corp. v. *B. & M. R. R. Co.*, 104 I. C. C., 327.

Liquid Carbonic Co. v. *C. & E. R. R. Co.*, 104 I. C. C., 446.

Alabama Mining Institute v. *Illinois Central R. R. Co.*, 109 I. C. C., 740.

Case & Sons v. *Pennsylvania R. R. Co.*, 115 I. C. C., 694.

Fredonia Linseed Oil Works Co. v. *A. T. & S. F. Ry. Co.*, 122 I. C. C., 291.

Allen Mfg. Co. v. *A. G. S. R. R. Co.*, 126 I. C. C., 515.

Humble Oil & Refining Co. v. *B. S. L. & W. Ry. Co.*, 126 I. C. C., 717.

Republic Creosoting Co. v. *A. G. S. R. R. Co.*, 128 I. C. C., 547.

Iroquois Pulp & Paper Co. v. *A. A. R. R. Co.*, 128 I. C. C., 187.

Oklahoma Traffic Association v. *St. L.-S. F. Ry. Co.*, 129 I. C. C., 461.

Washington Coal Producers Assn. v. *Union Pacific R. R. Co.*, 129 I. C. C., 499.

Armstrong Cork Co. v. *A. C. & Y. Ry. Co.*, 136 I. C. C., 9.

Holland Furnace Co. v. *B. & O. R. R. Co.*, 136 I. C. C., 479.

Federated Metals Corp. v. *Pa. R. R. Co.*, 144 I. C. C., 243.

Elliott Jones & Co. v. *A. & W. P. R. R. Co.*, 144 I. C. C., 374.

Terre Haute Chamber of Commerce v. *A. & W. Ry. Co.*, 147 I. C. C., 247.

Krupp Foundry Co. v. *Southern Ry. Co.*, 148 I. C. C., 743.

Cleveland Worsted Mills Co. v. *Pennsylvania R. R. Co.*, 152 I. C. C., 257.

Hallsboro Mfg. Co. v. *Atlantic C. L. R. Co.*, 157 I. C. C., 124.

Penn Refining Co. v. *Western New York & Pennsylvania R. R. Co.*, 208 U. S., 208; 52 L. Ed., 456.

Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S., 42; 56 L. Ed., 83.

Peavey & Co. v. *Union Pacific R. Co.*, 176 Fed., 409, 424, 425.

East Tennessee V. & G. Ry. Co. v. *Interstate Commerce Commission*, 181 U. S., 1, 18; 45 L. Ed., 719, 725.

St. Louis S. W. Ry. Co. v. *United States*, 245 U. S., 136, 145; 62 L. Ed., 199, 208.

C. I. & L. Ry. Co. v. *United States*, 270 U. S., 287, 292, 293; 70 L. Ed., 590, 594.

American Express Co. v. *South Dakota*, 244 U. S., 617, 624; 61 L. Ed., 1352, 1357.

United States v. *Pennsylvania R. R. Co.*, 266 U. S., 191; 69 L. Ed., 243.

Minneapolis & St. L. R. R. Co. v. *Peoria & Pekin Union R. Co.*, 270 U. S., 580, 582, 583; 70 L. Ed., 743, 745.

United States v. *Illinois Central R. Co., and Wyoming R. R.* v. *United States*, 263 U. S., 515, 521, 527; 68 L. Ed., 417, 424, 426.

Skinner & Eddy. Corp. v. *United States*, 249 U. S., 557, 566; 63 L. Ed., 772, 778.

Pioneer Lumber Co. v. *Director General*, 64 I. C. C., 485, 490.

The 1929 order can not be sustained as the exercise by the Commission of its minimum rate powers since it is not supported by the subordinate findings necessary to justify the exercise of that power.

Florida v. *United States*, (*Florida Log Rate Case*), 75 L. Ed. Adv. Ops., 212, 221.

Baltimore & O. R. Co. v. *United States*, 277 U. S. 291; 72 L. Ed., 885.

Brimstone R. R. & Canal Co. v. *United States*, 276 U. S., 104; 72 L. Ed., 487.

ARGUMENT.

I.

The order of the Commission will be enjoined and set aside: (a) if the action of the Commission, while in form within its delegated power, is exercised in such an arbitrary and unreasonable manner as to transcend the legitimate bounds of its authority, (b) if the action of the Commission is based on an erroneous construction of the statute, (c) if the order of the Commission is not supported by evidence which shows a violation of the law by the carrier sought to be found guilty, and (d) if the order of the Commission is not supported by appropriate findings of ultimate facts which show a violation of the law.

The propositions above stated are firmly established in the law in a great many cases decided by this court, of which we have cited the more important ones under the same heading in outlining our points and authorities. Without analyzing each of the authorities it should be sufficient at this point to quote from one or two cases in which this court has summarized the extent of its powers in cases where an order of the Commission is sought to be enjoined. In *Interstate Commerce Commission* v. *Illinois Central Railroad Co.*, 215 U. S. 452, 470, 54 L. Ed., 280, 287, Chief Justice White, speaking for the court, said:

> "The statute endowing the Commission with large administrative functions, and generally giving effect to its orders concerning complaints before it without exacting that they be previously submitted to judicial authority for sanction, it becomes necessary

to determine the extent of the powers which courts may exert on the subject.

Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, *viz.*, whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688, 698; 39 L. Ed., 311, 316."

In *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; 56 L. Ed. 308, 311, the court stated the scope of its powers in a case involving the judicial review of an order of the Interstate Commerce Commission in the following language:

"in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule

that the substance, and not the shadow, determines the validity of the exercise of the power. *Interstate Commerce Commission* v. *Illinois C. R. Co.*, 215 U. S. 470, 54 L. Ed. 287, 30 Sup. Ct. Rep. 155; *Southern P. Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. Rep. 288; *Interstate Commerce Commission* v. *Northern P. R. Co.*, 216 U. S. 544, 54 L. Ed. 609, 30 Sup. Ct. Rep. 417; *Interstate Commerce Commission* v. *Alabama Midland R. Co.*, 168 U. S. 146, 174, 42 L. Ed. 414, 425, 18 Sup. Ct. Rep. 45.

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power."

It is further to be emphasized that, in a recent case, this court has held that an order of the Commission is void unless it is supported by the basic findings necessary to show a violation of the statute.

Florida v. *United States of America*, 75 L. Ed. Adv. Ops., 212.

In the remaining portion of this brief we set out the particulars in which the orders of the Commission here sought to be enjoined run afoul of one or more of the principles above stated.

The argument contained under the headings numbered II, III and IV below is directed to a demonstration that both the *1927* and the *1929 orders* are invalid and should be set aside, in other words, that no part of the port equalization practiced by the carriers defendant before the Commission resulted in a violation of Section 3.

The argument contained under Point IV is confined to demonstrating the invalidity of the *1929 order*, which was specifically directed to a condemnation of port equalization as maintained by the Louisiana port lines from and to points served by them.

II.

In entering both its 1927 and 1929 orders, the Commission acted arbitrarily and in a manner to transcend the legitimate bounds of its authority in that its orders, while in form directed to regulation of freight rates, in reality are directed (1) to the establishment of an arbitrary rate structure for the purpose of overcoming the assumed commercial and economic advantages of the Louisiana ports, and (2) to the diversion of tonnage from one through rail-and-ocean route to another through rail-and-ocean route. Such orders are arbitrary, exceed the Statutory power of the Commission, and therefore void.
(Germane to Assignments Nos. 11, 13-h, 13-j and 23).

In its 1927 and 1929 orders the Commission found that the port equalization complained of violated Section 3 (1) of the Interstate Commerce Act (49 U. S. C. A., Sec. 3), which reads:

> "It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The orders entered directed that the rates involved be changed so as to remove the preference and prejudice found.

It is true that the orders issued by the Commission in the case at bar are in form directed to freight rates. It requires, however, no deep probing of the record to discover that, in substance, the orders confer upon the Texas ports an adjustment of export, import and coastwise rates

more favorable than obtains to the Louisiana ports for the primary purpose of offsetting the assumed commercial and economic advantages of New Orleans, and for the further purpose of placing an arbitrary barrier in the way of foreign commerce which might seek an outlet to the sea via the Louisiana ports.

The proof of this is very largely found in the Commission's own decisions. In the *1925 report* the Commission after describing the issues, the situation as to rates and distance, and the attitude of certain interior shippers toward the proceeding, laid the entire basis for its decision in the following finding (R. 3360, italics ours):

> "New Orleans has certain natural advantages over Galveston which have affected the relationship of rates to the two ports. It is situated on the Mississippi River, at a natural division between, and terminus of, lines operating both east and west thereof. It therefore draws freight from both east and west of the river and by barge line down the river, which insures it not only a greater volume but a wider variety of freight than goes to Galveston, which is dependent upon the southwestern lines. *This fact in itself warrants careful scrutiny of a rate adjustment which is alleged to be unduly prejudicial to the port least favored by natural advantages.* While those natural advantages are entitled to consideration in so far as they have been brought about by geographical location, they are not entitled to much respect in so far as they have been brought about by rate advantages such as those here complained of. So far as the territory west of the Mississippi River, which we are here considering, is concerned, the difference between the natural advantages of New Orleans and Galveston is small. Both ports are natural objectives for export and coastwise freight orginating in that territory. The Southern Pacific lines reach both ports and the Missouri Pacific system, through control of the International-Great Northern and the Texas & Pacific, serves both ports. The policy of the southwestern carriers serving New

> Orleans, more particularly the Texas & Pacific, has been, generally speaking, to apply the Galveston rates to New Orleans on traffic moving from or to all points west of the Mississippi River, except points in Texas south of the Texas & Pacific. Such an adjustment necessarily disregards distance and commercial instead of natural advantages control. We have consistently refused to condemn such an adjustment where it is shown to serve the best interests of the public, but where, as here, it builds up one port at the expense of another equally favored by natural advantages from the origin territory here considered, a line must be found beyond which distance may not be disregarded."

Throughout the proceedings before the Commission, the appellants on whose behalf this brief is written, urged that an equality of inland import, export and coastwise rates, when coupled with an equality of steamship charges beyond the ports, was fair and lawful and that it promoted competition between those desiring to serve the shipping public. Complainants before the Commission, on the other hand, urged at great length that the Texas ports of necessity must have an adjustment of rail rates lower than applied to or from the Louisiana ports in order to offset the alleged superior commercial and economic advantages of the latter. In dealing with these contentions, the Commission, in its *1927 report*, said (R. 338-9):

> "New Orleans contends that the present basis of equalization promotes that healthy struggle of locality against locality which is the best security for proper commercial development, and that therefore the public interest is best served by the present adjustment. To this complainant replies that the general advantages of New Orleans over the Texas ports are so great and of such variety that an equalization of rates does not in fact equalize. It points out that the territory served by New Orleans from and to which lower rates apply than to and from Texas ports is much greater than the territory from and to which Texas ports have an

advantage in rates; that while the territory from which the Texas ports have an advantage in rates is limited, generally speaking, to points in Texas south of the line of the Texas & Pacific and, in respect of a few commodities, to points in Oklahoma and on grain and grain products from points on the Santa Fe in Kansas, New Orleans has a rate advantage from practically all of the territory east of the Mississippi River and from the greater portions of Louisiana, Arkansas, and western trunk-line territory, and enjoys the benefits from the barge lines on the Mississippi River from a large portion of the territory from which it draws its traffic. The following advantages of New Orleans not directly attributable to rates were instanced: Frequency and regularity of steamship sailings to practically all ports in the world; superior banking facilities; location of headquarters or important branch offices of leading steamship lines, export and import commission houses, and commercial representatives of foreign countries and foreign buyers; volume of exports and imports moving locally to New Orleans for storage, handling, and sale through local commission houses; volume of imports consumed locally in New Orleans; use of long-established trade routes and port arrangements; location at mouth of Mississippi River at the terminus of east-and-west rail lines and north-and-south barge lines; cheap labor cost, cheap Alabama coal for bunker use; efficient and adequate port facilities under a co-ordinated and unified system of public ownership and operation; fresh-water docking; and a large territory tributary to the port furnishing for movement through the port a wide variety of general cargo. Largely because of these and other advantages New Orleans draws traffic from 26 States and from points from which the rates are in some instances higher, in others the same, but in most instances lower than to the Texas ports, while the Texas ports, because of the absence of these advantages, can draw traffic, generally speaking, only from a limited territory in the southwest."

The Texas ports, in their plea to the Commission, went even farther. They pointed out that, as between New Or-

leans and other Gulf ports, on the one hand, and the North Atlantic ports, on the other, differentials were maintained in favor of the Gulf ports, even in the face of more adverse transportation conditions, in order to offset the superior steamship services to and from the North Atlantic ports. The Commisison notes in its *1927 report* a contention on behalf of the Texas ports that a similar relative condition obtained as between the Louisiana ports, on the one hand, and the Texas ports, on the other, this being said by the Commisison (R. 3390):

> "Applying the same principle to the Texas ports complainant contends that it is justified in asking for differentials under New Orleans because of the superior steamship service to and from the latter port."

The importance attached by the Commission to this contention is evidenced by the following striking statement in the *1297 report* (R. 3391):

> "While such commercial advantages as are above enumerated can not be determinative of rate relationships, and few of them can be taken into consideration in passing upon the questions of undue prejudice, they serve to confirm the impression that the advantages of New Orleans, whether natural or acquired by progressive enterprise, are so superior to those of the Texas ports that an affirmance of the findings in the original report would not be likely to cause serious injury to the port of New Orleans."

And further in the same report the Commission said (R. 3391):

> "Healthy competition is no less important between ports than between rail or water carriers. There is, however, a limit beyond which the disregard by rail carriers of the geographical advantages of one port in favor of another will impair rather than promote healthy competition between the ports. There is much ground for believing that a policy of port equalization, if carried beyond reasonable limits, has the effect of strengthening unduly, at the expense of others, those

ports which by reason of natural or acquired advantages have attained commanding positions in the export and import trade."

The repeated emphasis by the Commission upon the economic and commercial advantages of New Orleans as a port was to lay the groundwork for the finding requiring the establishment of differentials. The Commission, very obviously, was of the opinion that Galveston, lacking the same commercial and economic advantages, was entitled to a rate structure which would have the effect of diverting to Galveston tonnage which, otherwise, under an equalized rate structure, would be attracted towards New Orleans because of assumed superior nontransportational facilities afforded by the latter port. We deal later in this brief with the effect upon the fortunes and prosperity of the Texas ports under the equalized rate structure. Our present point is confined to showing that the primary purpose of the Commission was to require differentials in order to divert tonnage to a route which felt itself unable to compete therefor on an equal rate basis. So we find this is said in the *1925 report* (R. 3354-5):

"Complainant urges that the establishment of the differentials prayed is absolutely essential to the continued existence of Galveston as a port. It states that were it not for the lower rates to Galveston than to New Orleans on cotton and grain and their products from most of Texas, and on grain and its products from Santa Fe points in Oklahoma and Kansas, Galveston could not exist as a port, despite the fact that millions of dollars have been expended by the Federal Government and the people of Galveston in its development; that New Orleans draws not only a greater volume of freight than does Galveston, but freight of a more diversified kind, which insures it an efficient steamship service and attracts shipments of parcel freight to New Orleans that will not go to Galveston; that shippers of flour in parcel lots, for example, rarely use the port of Galveston because of their apprehension

that the ship will be delayed awaiting completion of cargo or in calling at some other port for completion thereof; and that the foregoing situation is due largely to the ability of New Orleans to draw freight from the southwestern territory contiguous to Galveston and the inability of Galveston to draw freight from the territory east of the Mississippi and north of the Ohio River, which is nearer to New Orleans than to Galveston."

And further in the same report (R. 3361):

"The facilities for water transportation from or to and at Galveston cannot be preserved in full vigor under a rate adjustment which unduly favors New Orleans. It is important that all ports be kept open and in as vigorous a condition as possible so that water lines may be attracted thereto and the public given the cheapest and most efficient service, both by water and and by rail."

In the *1927 report* the Commission makes the following statement as evidencing its appreciation of the fact that the primary thing to be accomplished was, not the regulation of rates, but was the establishment of a rate structure which would divert traffic to the complaining ports (R. 3388):

"The testimony leaves little doubt that the differentials prescribed in the original report, or even smaller differentials on most of the commodities, would in time divert to the Texas ports a substantial portion of most of the commodities having origin or destination in the affected territory that are now moving through New Orleans. On several of the commodities, however, green coffee for instance, the movement that would be diverted from New Orleans would probably be small. The establishment of differentials would seem more certain to divert from New Orleans practically all of the movement of grain and grain products and petroleum and petroleum products originating in differential territory than of any of the other commodities."

As bearing upon the same matter, we have already quoted another observation made by the Commission in its *1927*

report to the effect that New Orleans had such superior commercial and economic advantages that it could not be hurt if traffic were diverted therefrom. (R. 3391.)

If further evidence is needed that the judgment of the Commission was controlled by facts and circumstances entirely without the purview of the statute, we need only refer to the exemption of petroleum products from the 1927 order.

In so far as inland transportation circumstances and conditions are concerned, petroleum products stand on no different footing than the other commodities involved in this case. There is identically the same extra haul in handling that commodity to and from New Orleans as there is in the case of grain, for example. If the Commission actually decided this case according to the transportation standard used by it, *i. e.*, distance, it would necessarily have found that the same undue preference and prejudice existed in respect of export rates upon petroleum products as existed in respect of the export rates upon the other commodities involved in the case.

The Commission, however, found that the equalized structure was not unlawful in so far as petroleum products were concerned, and the reasons announced for that difference in findings makes it plain that the Commission was influenced by circumstances wholly unrelated to transportation, such circumstances being the relative economic and commercial advantages of the ports involved and the degree to which they had participated in the traffic under the equalized rate structure. For example, in dealing with the petroleum product situation, the Commission finds that, under equalization, the Texas ports have secured at least a fair share of this export and coastwise business. (R. 3398.)

The Commission pointed out the possibility of injury to

interior refineries if a different adjustment be required (R. 3398-9), and further found that the establishment of differentials would divert the entire export business in petroleum products to the Texas ports. (R. 3399.)

Reverting again to the difficulties experienced by interior refineries in meeting competition, the Commission finds (R. 3400):

> "A review of these facts leads to the conviction that higher rates to the Louisiana ports than to the Texas ports would do serious injury to the independent refining industry in the mid-continent field."

Because of the asumed differences as between petroleum products, on the one hand, and the other commodities, on the other, in respect of commercial, economic and competitive conditions, although admittedly there were no differences from a transportation standpoint, the Commission found, in its *1927 report* that the equalization of the Louisiana ports with the Texas ports in respect of import, export and coastwise rates on petroleum products did not occasion undue preference or prejudice. (R. 3318-9.)

The dissenting opinions of Commissioners McManamy and Taylor (R. 3228) make it plain that the differentials were required in the one case and not in the other solely because the Commission proceeding on the theory that it should establish rates so as to reflect the relative situation of the various ports in respect of commercial and economic conditions.

Since the decision in the case at bar, the Commission in two separate proceedings has dealt with the adjustment as between the Texas ports, on the one hand, and the Louisiana ports, on the other, in respect of rates on blackstrap molasses from said ports to destinations within differential territory in Kansas and Oklahoma.

In *I. & S. Docket 3473, Blackstrap Molasses from Louisi-*

ana Points to Kansas and Oklahoma, 171 I. C. C. 583, involving domestic rates, and in *I. & S. Docket 3429, Blackstrap Molasses from Louisiana Ports to Kansas and Oklahoma,* 171 I. C. C. 591, involving import rates, the Commission found that it was **not unlawful** to equalize New Orleans with the Texas ports, a finding directly opposed to those made in the instant case. In both cases the Texas ports relied on the decision of the Commission in this case as prohibiting equalization. Here again, in so far as the transportation situation is concerned, blackstrap molasses stands on no different footing than grain or any of the other commodities on which differentials were prescribed in the case at bar. The decisions of the Commission in the blackstrap cases make it plain that the Commission came to a different conclusion there than in the case at bar because of assumed differences in respect of commercial, economic and competitive conditions.

The argument we are making is not that the orders in the case at bar are void because inconsistent with those entered in the case of petroleum and blackstrap molasses. The mere fact of inconsistency is not assailable in this Court. We do argue, however, that the reasons advanced by the Commission for the purpose of explaing the seeming inconsistency in findings make it clear that the differentials prescribed are based on economic and commercial conditions wholly unrelated to transportation.

This Court, however, has repeatedly held that the decisions of the Commission must be based on conditions and circumstances surrounding the through transportation and not upon conditions and circumstances unrelated to transportation.

In *I. C. C.* v. *Diffenbaugh,* 222 U. S. 42, 56 L. Ed. 83, Mr. Justice Holmes, speaking for this Court, said that the

Interstate Commerce Act "does not attempt to equalize fortune, opportunities or abilities."

In citing the foregoing case as its authority, this Court, in *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445, 59 L. Ed. 1036, 1041, said:

> "It is to be observed that not every advantage that may inure to a shipper as the result of the position of his plant, his ownership, or his wealth, is a preference."

In *Willamette Valley Rate case*, 14 I. C. C. 61, the Commission found unreasonable a specific rate on lumber, its action being based primarily upon a consideration of the effect of the rate on the lumber industry. On its face the order was in due form and valid, simply holding that a specified rate was unreasonable. The order of the Commission in that case was enjoined in *Southern Pacific Co.* v. *I. C. C.*, 219 U. S. 433, 55 L. Ed. 283, on the ground that the Commission's finding and the order was not based on evidence dealing with transportation services and rates, but was rather based upon the Commission's conception of what were the equities of the situation.

A recent case, in which the principle we are here discussing was applied, is *Anchor Coal Co.* v. *U. S.*, 25 Fed. (2d) 462.

In that case the special court, composed of Parker and Northcott, Circuit Judges and McClintic, District Judge, had before it the question as to whether or not an order of the Interstate Commerce Commission involving rates on coal should be enjoined. In its order the Commission had directed certain carriers, serving coal fields in West Virginia, Virginia, Tennessee and Eastern Kentucky, to cancel rate schedules filed by them in which they had proposed a reduction of 20 cents per ton in the freight rate on "lake cargo" coal from the territory named to the lake ports. The purpose of the defendant carriers in so reducing their

rate was to place coal producers located on their line in competition with coal producers in Pennsylvania, who enjoyed a lower basis of rates. The special court enjoined the Commission's order largely on the ground that the order was, in part at least, an effort to regulate economic and industrial conditions through the guise of rate regulation.

At page 471, the court said:

> "We think that the enforcement of the order here complained of should be enjoined: (1) because the Commission exceeded its powers, in that its action was based, in part, at least, upon industrial conditions, and was essentially an effort to equalize industrial conditions or offset economic advantages through adjustments of rates; * * * If we are correct in our analysis of the reports of the Commission, there can be no doubt that it exceeded its powers. Of course, since the passage of the Transportation Act of 1920 (49 U. S. C. A. sec 71 *et seq.;* Comp. St. sec. 10071¼ *et seq.*), the Commission has the right to prescribe minimum rates, and we agree with the Commission that a construction of the law is too narrow which limits its right to prescribe such rates to cases where the rates proposed are unreasonable *per se*, or are so low as to cast a burden on other traffic. It has the right to prescribe minimum rates also to prevent ruinous rate wars and to guarantee reasonable earnings, not only to the carriers affected, but also to competing carriers, who may labor under a higher cost of doing business. *New England Divisions Case*, 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605; *Dayton-Goose Creek R. Co.* v. *U. S.*, 263 U. S. 456, 44 S. Ct. 169, 68 L. Ed. 388, 33 A. L. R. 472. And where the Commission fixes a rate or prescribes a minimum in the exercise of the powers conferred upon it, the courts will not interfere with its action, however much they may disagree with its reasoning. The Commission does not have the right, however, to regulate industrial conditions under the guise of regulating rates. And in a case like this, where there is no rate war, where there is no finding that the rates condemned will deprive the carriers of a fair return, and where they cannot injure competing car-

riers or carriers from a competing locality because they are actually higher than the maximum rates which such carriers may charge the commission does not have the right under the law to prohibit the reduction because of a shift in traffic which has occurred from the locality having the lower to the locality having the higher rate.

As pointed out above, for the Commission to fix rates upon such a basis is for it to assume the task of equalizing industrial conditions through rate adjustments. We do not think that Congress could give such power to the Commission. *Hammer* v. *Dagenhart*, 247 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724. We are perfectly certain that it has not attempted to do so. It is provided that carriers shall establish 'just and reasonable rates.' *U. S. C.* tit. 49 Sec. 1 (4), 49 U. S. C. A. Sec. 1 (4); Comp. St. Sec. 8563 (4). It is made unlawful for any carrier 'to make or give any undue or unreasonable preference or advantage to any particular person * * * or locality' section 3 (1), 49 U. S. C. A. Sec 3 (1), Comp. St. Sec. 8565 (1). The Commission is given power to determine and prescribe 'what will be the just and reasonable * * * rate * * * to be thereafter observed * * * or the maximum or minimum, or maximum and minimum to be charged.' Section 15 (1), 49 U. S. C. A. Sec. 15 (1); Comp. St. Sec. 8583 (1). But nowhere is it provided that in doing so the Commission may prefer one section of the country over another, or that it may fix rates, or may prevent the fixing of rates by the carriers, with a view of placing competing producers upon an equality or of compensating for disadvantages under which competing communities may labor. Manifestly such a power is not conferred by the statutes referred to, for rates fixed with such an end in view are not 'reasonable,' but are unreasonable and constitute an unprecedented interference with the industrial conditions of the country.

In the *Ashland Fire Brick case*, 22 I. C. C. 115, 121, Commissioner Franklin K. Lane said: 'It seems unnecessary here to state that the power has not been lodged with this tribunal to equalize economic advan-

tages, to place one market in competition with another, or to treat all railroads as a part of one great whole.' And in *I. C. C.* v. *Diffenbaugh*, 222 U. S. 42, 46, 32 S. Ct. 22, 24, 56 L. Ed. 83, Mr. Justice Holmes says that the Interstate Commerce Act 'does not attempt to equalize fortune, opportunities or abilities.'

In the *Willamette Valley Rate Case*, 14 I. C. C. 61, *So. Pac. Co.* v. *I. C. C.*, 219 U. S. 433, 31 S. Ct. 288, 55 L. Ed. 283, the Commission held a $5 rate on lumber unreasonable. Its report showed that the holding was based primarily on the view that the rate would be unjust to lumber dealers who had established their business in the Valley on the faith of a $3.10 rate. There was some evidence bearing upon the reasonableness of the $3.10 rate; but in that case, as we think in this, the report of the Commission showed that its action was based primarily upon a consideration of the effect of the rate on industry. The Circuit Court (177 F. 963) refused to enjoin the order of the Commission, but this was reversed by the Supreme Court in a unanimous decision, the opinion being written by Chief Justice White. What he said in that case is pertinent here. Said he:

'What was the nature and character of the order made by the Commission? That is, what, in substance, was the power which the Commission exerted in making the order? Coming to the consideration of that subject, we are of opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests. We proceed very briefly to state the reasons which compel us to this conclusion. In the first place, when the complaint which was made to the Commission and the answer of the railroad companies to that complaint are considered they give rise to the inference that in substance the subject complained of was not the intrinsic unreasonableness of the new rate which the railroad companies substituted for the former rate, but the injury it was thought would be suffered from not con-

tinuing the old rate in force, an injury arising from circumstances extrinsic to the new rate; that is, a loss which would be suffered by substituting the higher rate, even if that rate was in and of itself reasonable and just. * * * While it is true that the opinion of the Commission may contain some sentences which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, we think when the opinion is considered as a whole in the light of the condition of the record to which we have referred it clearly results that it was based upon the belief by the Commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate which had prevailed for some time to a just and reasonable charge for the service rendered for the future.'

Although this decision was rendered prior to the passage of the Transportation Act of 1920, there is nothing in the Transportation Act which justifies the assumption of the power to raise and lower rates or to prevent rates being lowered in order that industries may be put upon a competing basis or that those near a market may enjoy the advantage of their location. That act does provide that in the exercise of its power to prescribe just and reasonable rates the Commission shall establish them so that carriers as a whole or in rate groups will earn a fair return upon the value of their property. Section 15 (a) (2). And in the exercise of this power the Commission can undoubtedly establish minimum rates righer than required for a fair return to the carriers more favorably situated in order that a fair return may be realized by competing carriers less favorably situated and that an efficient transportation system may be thus afforded to the sections served. *Dayton-Goose Creek Ry.* v. *U. S.*, 263 U. S. 456, 44 S. Ct. 169, 68 L. Ed. 388, 33 A. L. R. 472; *New England Divisions Case*, 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605. But we are satisfied that it was never intended by the act that, in exercising this power, the Commission should consider the loss of business

> of one community due to industrial conditions and attempt to restore it by increasing the differential in the freight rates between that community and others which compete with it."

This Court reversed the decree of the District Court in the *Anchor Coal Co. Case* but not on the point covered by the foregoing quotation (279 U. S. 812, 73 L. Ed. 971).

In *Atchison, T. & S. F. Ry. Co.* v. *I. C. C.* 190 Fed. 591, the Commerce Court set aside an order of the Commission prescribing a reduced rate on lemons from California to eastern destinations, on the ground that the order was entered to protect the lemon industry against foreign competition, and was not based on transportation conditions.

The point we are here making was one of the grounds upon which Foster, C. J., based his dissenting opinion, saying (R. 3581-2):

> "It is evident that the Commission did not base its order merely on the additional length of haul but took into consideration the superior natural advantages of New Orleans and its greater facilities as a port * * *. The Commission was not authorized to equalize port advantages by an adjustment of rates."

Because the *1927 and 1929 orders* are based on matters unrelated to transportation, they are void and should be enjoined.

III.

In entering both its 1927 and 1929 orders, the Commission acted arbitrarily, and without regard to its statutory duty, in that it failed to give consideration to the fact that competition of competing through rail-and-ocean routes, via which an equality of charges and conditions prevailed, justified the equalization of the inland rail rate factors.

(Germane to assignments Nos. 13-c, 18 and 24.)

The traffic which moves under the rates involved in the case at bar does not have either the Louisiana or the Texas ports as its origin or destination. It is traffic between an inland point located on one of the rail lines and a foreign or domestic port which requires the use of a line of steamers beyond the Louisiana and Texas ports in order to complete the through transportation.

One of the chief grounds relied upon by appellants as justifying the equalization of the rail rate portion of the through charges on such traffic was that the steamer rates beyond the ports were the same, irrespective of whether the traffic moved through Galveston or through New Orleans.

In its *1925 report* the Commission found that there was a parity of steamer rates to and from the ports alleged to be prejudiced and those alleged to be preferred. (R. 3348.) A similar finding was made in the *1927 report* (R. 3387-8), and in addition the Commission there found:

> "The testimony is that rate differentials in favor of one or more Gulf ports would not result in lower steamship rates from or to the ports against which the differentials were established, at least not to the extent of the rail differentials."

Under such circumstances, the equalization of inland rail rate factors affords alternative routes to interested shippers and their commerce, one via the Texas ports and the other via the Louisiana ports, this at a parity of through charges. It is obvious, however, that, if the inland rate factors be so readjusted as to make, by that fact alone, lower charges via one route than via the other, commerce, which follows the line of least resistance, will move via the lower rated route.

We urge that it is arbitrary for the Commission to base its decision on matters which relate solely to inland rate factors, thereby closing its eyes to the fact that such factors are but part of through charges, and to the fact that the through charges, if port equalization be continued, are on a parity. Where the same through charge is assessed for a similar through service, there can be no undue preference or prejudice, even though, *if a portion only of the rate be dissected*, it appears that for the rail part of the haul the charge is lower per ton per mile when the movement is via New Orleans than when it is via Galveston. The Commission refused, however, to consider the equality of the through charges and service, its finding in regard thereto being stated as follows (R. 3404-5, italics ours):

> "The Texas & Pacific insists that since this traffic neither originates at nor is destined to any of the ports, the rail rates which we are here considering are in essence proportional rates, constituting merely factors of the aggregate through rates between the interior points and the foreign or coastwise destinations beyond, and that in determining the matter of port equalization consideration should be given, not only to the rail factors, but also to the water factors which enter into these aggregates. In *Tobacco from Ohio River Crossings*, 73 I. C. C. 384, division 2 *found a similar contention to be without merit*. Equalization of port rates on the basis advocated by this carrier would require consideration, in every instance of port relation-

> ship, of water rates not on file with us and over which, except on coastwise traffic under certain circumstances, we have no jurisdiction. This does not mean, however, that the fact that a port is not the origin or destination of the traffic passing through it is not entitled to consideration in countenancing greater disregard of distance in import, export, or coastwise rates than in corresponding domestic rates."

The finding of the Commission above quoted, that our contention in respect of this matter is without merit, is directly contrary to the principles announced by this court in *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission* (the *Import Rate Case*), 162 U. S. 197, 40 L. Ed. 940.

In that case the Commission had entered an order requiring that the rail defendants charge no lower rate on import traffic than on domestic traffic originating at the same port. (*New York Board of Trade & Transportation* v. *Pennsylvania R. R. Co.*, 3 I. C. Rep. 417, 4 I. C. C. Rep. 447.) The Texas & Pacific Railway Company refused to obey the order and the Commission filed a bill to enforce it.

As illustrative of the rates which the Texas & Pacific in that case desired to continue so as to compete with other routes, and which the Commission condemned, the report of the Commission (4 I. C. C. Rep. 447, 466) shows rail rates from New Orleans to San Francisco as follows: on barley, 70 cents on import traffic and $1.80 on domestic traffic; on dry goods 80 cents on import traffic and $3.74 on domestic traffic, and on soap 70 cents on import traffic and $1.60 on domestic traffic. The preference accorded import traffic by the rate structure just illustrated was much greater than any preference accorded New Orleans under the equalized rate structure involved in the case at bar.

In the *Import Rate Case* this Court held that the order of the Commission was void and could not be enforced because the Commission gave no consideration to the effect

upon competing routes of the rates and service of ocean carriers. The error of the Commission in that case was the same as the error of the Commission to which we are now addressing ourselves. In the case cited, Mr. Justice Shiras, speaking for the Court, thus stated the question to be decided (page 205 of 162 U. S., and 942 of 40 L. Ed.):

> "We come now to the main question of the case, and that is whether the Commission erred when making the order of January 29, 1891, in not taking into consideration the ocean competition as constituting a dissimilar condition, and in holding that no circumstances and conditions which exist beyond the seaboard in the United States could be legitimately regarded by them for the purpose of justifying a difference in rates between import and domestic traffic."

And, after describing the character of the competitive routes with which the Texas & Pacific had to compete, expressed this conclusion (page 207 of 162 U. S., and 943 of 40 L. Ed.):

> "These and other uncontroverted facts that appear in this record would seem to constitute 'circumstances and conditions' worthy of consideration, when carriers are charged with being guilty of unjust discrimination or of giving unreasonable and undue preference or advantage to any person or locality.
>
> But we understood the view of the Commission to have been that it was not competent for the Commission to consider such facts, that it was shut up by the terms of the act of Congress, to consider only such 'circumstances and conditions' as pertained to the articles of traffic after they had reached and been delivered at a port of the United States or Canada."

From the words of the Commission quoted above, it is apparent that again in this case the Commission did just what it did in the *Import Rate Case*, *i. e.*, it refused to consider any of the circumstances and conditions surrounding the transportation except those which pertained to the traf-

fic during the time it was in the possession of the rail carriers.

In the *Import Rate Case* this was also said (pages 219 and 220 of 162 U. S., and 947 of 40 L. Ed.):

> "The mere circumstance that there is, in a given case a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable."

In the *Import Rate Case* this Court cited, with approval, the following statement by Lord Herschell from *Phipps* v. *London & N. W. R. Co.* (1892), 2 Q. B. 229:

> "I can not but think that a lower rate which is charged from a more distant point by reason of a competing route which exists thence is one of the cases which may be taken into account under those provisions, and which would fall within the terms of the enactment."

Additional observations of this Court pertinent to the point here under discussion, and upon which it predicated its ultimate conclusion that

> "There manifestly was error in excluding facts and circumstances that ought to have been considered."

are as follows (pages 233 and 234 of 162 U. S., and 952 of 40 L. Ed.):

> "The conclusions that we draw from the history and language of the act, and from the decisions of our own and the English courts, are mainly these: * * * That, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, * * *

may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers * * *. That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."

The English cases cited by this Court in the *Import Rate Case*, as well as the additional English cases which we cite below, merit especial consideration since Section 3 of our Act is taken directly from Section 2 of the English Railway and Canal Act of 1854 (17 and 18 Vict. C. 31). In *Interstate Commerce Commission* v. *Baltimore & O. R. R. Co.*, 145 U. S. 263, 284; 36 L. Ed. 699, 706, this Court held that in so doing Congress must have had in mind the construction placed upon the section by the English courts.

An English case decided the same year that Section 3 of our own Act was enacted, and which is directly in point upon the question here under consideration is *Londonderry Port and Harbour Commissioners* v. *The Great Northern Ry. Co. (Ireland), et al.* (1887), 5 Ry. & Can. Traf. Cas. 282. In that case complaint was made because the Great Northern Railway Company of Ireland, which had access to the sea at several ports arranged a better scheme of through routes and service in connection with the London and North-Western Railway Company and the Dundalk and Newry Railway Company via the port of Greenore than via the port of Derry. That case, as this one, involved traffic which was water-borne beyond the ports. To the point that the Commissioners should consider the whole route,

charges and facilities rather than just the inland portion, Sir Frederick Peel, at page 284, said:

> "As this application has reference to cross channel traffic, regard must be had to the throughout route, and not merely to one portion of it, for, on the question whether enough is done in the interest of a port of shipment, or of any other point in a route by which such traffic may pass, to attract the traffic that way, as much or more depends upon how matters stand in relation to rates and services upon a view of the whole distance, as upon the manner in which just a portion of the route compares in these respects with some similar portion of another route."

And again, on page 293:

> "The through rates then by Greenore are made under these agreements, and they are by the terms agreed upon single rates for sea and land transit combined; and an apportioned part of a through rate can hardly be compared with a local rate, as if the two were of a similar kind. Nor does it seem to us to signify how an apportioned part of a through rate by one route compares with a local rate by another route, unless, indeed, the latter has no other rates at which through traffic can be sent by it. But this is not altogether the case with the Derry route. It is true the applicants quote in illustration of their complaint the through rates for tea *via* Greenore from London to various stations on the Derry and Enniskillen line, and show how much less relatively to distance is the Great Northern Company's mileage proportion of these through rates, than its local rates from Derry, to the same stations; and they observe that, with this difference against him, the dealer in Derry cannot compete with the dealer in London in supplying the inland stations. But in this case, there are through rates by Derry, as well as by Greenore, and though these rates, whatever their amount is, ought to be equal, it is not necessary that the amount should be such that it shall cost an inland station the same, whether its traffic is booked through at a through rate, or is booked first to Derry, and thence re-booked at the local rate. More, we think, cannot be required of the Great Northern than to have

between the same places equal through rates by both routes * * *."

In giving his opinion in the same case, Mr. Commissioner Miller said:

> "I do not think, however, that even in this case we can have regard to the apportionment of the through rate, or inquire what amount, whether as a whole or per mile, any particular company interested in the route is receiving out of it; the through rate appears to me to be for this purpose one indivisible entity * * *. What the customer has to regard is indeed the through rate as a whole, and not the separate interests of the several companies concerned, but in regarding that whole it is immaterial to him whether the route is the property of a number of companies or of one only. The result of regarding the question in this light is to lead me to the same conclusion, as regards the several cases complained of, as has been independently arrived at by the Chief Commissioner."

Another more recent English case which also bears upon the question here under discussion is *Dublin and Manchester Steamship Co.* v. *London and North-Western Ry. Co.* (1912), 15 Ry. & Can. Traf. Cas. 88, in which the facts were as follows:

The defendant railway company operated lines of railroad between the interior of England and two ports on the Irish Sea, *i.e.*, Manchester and Holyhead. Between Holyhead and Dublin the defendant also operated a line of steamers in connection with which it maintained a line of rates applicable on through traffic between the interior of England and Dublin. The applicant, the Dublin and Manchester Steamship Company, operated a line of steamers via sea and canal between Manchester and Dublin, over which through rates were also maintained made up of the inland rail rates of the defendant and the sea and canal rates of the applicant.

The length of the sea and canal transit by applicant's

route was 175 miles as compared with the sea transit of 70 miles by the defendant's route, but the length of the railway transit to places in the midlands of England was considerably shorter by the former route. The through charges were the same via both routes, but the rail portion of the through charges was relatively much higher to or from Manchester than to or from Holyhead. For example, on stout the mileage rate for railway conveyance from Holyhead to Coventry, 176 miles, was .96*d.* per mile as compared with 1.96*d.* per mile for the railway conveyance from Manchester to Coventry, a distance of 104 miles. The applicant complained that the defendants were unduly preferring the route via Holyhead because of this difference in the measure of the charges for the inland rail haul, and urged not only that there should be a lower charge for the rail haul inward from Manchester because of the lesser relative rail service, but also urged that the inferiority of the route via Manchester required a differential in favor of that route. The case so made for applicants is identical with the position which the complainants in the case at bar took before the Commission.

The court held that no undue preference or prejudice resulted from these circumstances, Mr. Justice Lawrence saying at page 95:

> "I have now to consider the main question, that of undue preference. The charge is based on the fact that the defendants' rate *via* Holyhead has been reduced to the same amount as the applicant's rate *via* Manchester * * *. It is said that, when this rate *via* Holyhead is compared with the rate which the applicant is charged for sending his traffic forward from Manchester, it appears that the charge per mile is higher from Manchester. Thus, if Coventry be taken as an example, the charge per mile works out at 0.96*d.* per mile from Holyhead to Coventry, and to 1.96*d.* per mile from Manchester to Coventry. This is undoubtedly true, but it is the old case of comparing a section of

a through rate with a local rate. This has never been held to be a good ground for holding the through rate to be an undue preference, even where the traffic passes over the same rails. Here it does not, but comes over sections of the company's system as widely different as North Wales from the heart of Lancashire."

And again at page 96:

"Then it was suggested for the applicant that he was entitled to require the railway company to 'give him a differential,' as it was called; that is to say, to compensate him for any inferiority in his route or his service by maintaining the railway company's rates at a higher level than his. It was shown that some Irish carriers did this, some by statute, others by agreement. We are asked to incorporate the practice into the law of undue preference, and to say that, where there is no statute and no agreement, not to do so is an undue preference by the railway company of themselves. The case has not been shaped or opened and no evidence has been adduced, on these lines, and it is sufficient to say that we see no ground for acceding to the argument. It would be to stereotype rates at a level higher than those of the worst competitor. The case for undue preference wholly fails."

The Honorable A. E. Gathorne-Hardy, at page 99, said, in respect to this equality of through charges despite the disparity of inland rail freight rates:

"* * * There is nothing to show that * * * there is more than ordinary and legitimate competition."

On the same page Sir James Woodhouse said:

"Upon the substantial issue in this case, namely, that of undue preference, I agree with my colleagues. Questions of undue preference are always difficult ones, and they depend for their solution upon the actual facts and circumstances of each particular case. Preference is only illegal when it is, in the opinion of the Court, unjust, and since the case of *Pickering Phipps* v. *London and North-Western Railway Company* in 1892(1),

(1) 8 Ry. & Can. Traf. Cas., 83; (1892) 2 Q. B. 229.

the principle has been well settled, that it is not unjust if it is the natural result of, or necessary for, the purposes of fair competition."

And again on page 100:

"It is said that the railway portion of the through rate from Holyhead to the inland towns is relatively to distance per ton mile unduly low compared with the rate from Manchester Docks, and that this is evidence in itself of the preference complained of. The applicants, in order to found the complaint, split up the through rate into the sea portion and the land portion, and then compared the land portion of the through rate from Holyhead with the local rate from Manchester to the inland towns. But the answer to this is that the comparisons are not in point. The Manchester rate is a local rate; the Holyhead rate which is compared with it is not a local rate, but a proportion of a through rate, and it has been decided that you cannot compare a local rate with a portion of a through rate for the purpose of establishing a case of undue preference."

In the case at bar the complainants before the Commission, to support their right to relief, found it necessary to split up the through charge from inland origin to foreign destination into a sea portion and a land portion, and then to compare the land portion of the through rate between the inland point and Galveston with the land portion of the through rate between the same inland point and New Orleans. That split-up had to be made from complainants' standpoint, otherwise there would be simply a showing of an equality of aggregate services and charges via both the Texas and the Louisiana ports. The Commission should have taken the same action as did the Railway Commissioners of England in the *Dublin and Manchester Steamship Company Cose, supra, i.e.,* find that the aggregate through charges must necessarily be considered before it could determine whether the route via the Louisiana ports was being unduly preferred or not.

The failure of the Commission to treat with the total route and the total charges makes its action arbitrary and its orders are consequently void.

IV.

The 1927 and 1929 orders are not supported by evidence which shows that the equalization of competing ports in respect of export, import and coastwise rates results in preference and prejudice which is undue.

AN EQUALIZED EXPORT, IMPORT AND COASTWISE RATE STRUCTURE DOES NOT VIOLATE SECTION 3 OF THE ACT SO LONG AS (1) THE RATE TO THE NEARER PORT IS NOT IN EXCESS OF A MAXIMUM REASONABLE RATE, (2) THE EQUALIZED RATE TO THE MORE DISTANT PORT IS NOT SO LOW AS TO CAST A BURDEN ON OTHER TRAFFIC, AND (3) THE EQUALIZATION IS NECESSARY IF THE CARRIERS SERVING THE MORE DISTANT PORT ARE TO COMPETE FOR THE THROUGH TRAFFIC IN RESPECT OF WHICH THE PORTS ARE BUT JUNCTION POINTS BETWEEN RAIL AND OCEAN CARRIERS.

(Germane to assignments Nos. 6, 12, 13-a, 13-b, 13-j and 14.)

The question we now come to discuss is primarily one of law and not of fact. We are not asking that the Court explore in detail the voluminous record in the case at bar and then exercise its independent judgment as to whether or not there is some evidence which supports the findings of the Commission. Rather, in the argument on this point we deal with facts which are uncontroverted, and, after resolving all doubts against ourselves, we assert that the Commission and the trial court entirely misconceived what constitutes preference and prejudice which is undue in violation of Section 3. Briefly stated, our point is that the Commission's conclusions of law and its findings as to the

existence of undue preference and prejudice as an ultimate fact are not supported by and do not legally follow from the basic findings of fact made by the Commission in the several cases here under review. In other words, we ask the Court to apply in this case the principle enunciated in *Philadelphia & Reading Railway Co.* v. *United States*, 240 U. S. 334; 60 L. Ed. 675, where this Court held that if the facts reported in a decision of the Commission afford no foundation for the Commission's findings, enforcement of an order based thereon must be enjoined.

True it is, that the appellant railroads in maintaining an equalized export, import and coastwise rate structure applied to and from New Orleans for longer distances the same rates that the Texas port lines applied to and from the Texas ports for shorter distances. That fact, however, standing alone will not support an ultimate finding that *undue* prejudice and preference were thereby occasioned.

There are no findings of any significance that damage resulted to the Texas ports from the equalized rate structure. In fact, the complainants themselves, in making what are later shown to be unsound contentions regarding their inability to compete under the equalized rate structure, rest their case not on rate or transportation matters but on the alleged superior commercial and economic advantage of New Orleans with which we have dealt above. It is difficult to see how any damage could possibly result to the Texas ports under an equality of rates since the term "equality" itself connotes the imposition of no handicap.

The findings made by the Commission fully disclose that, under the equalized rate structure, the Texas ports, despite their alleged lack of commercial and economic advantages, have grown and prospered to a far greater degree than has the port of New Orleans.

The most appropriate index by which to gauge the suc-

cess or failure of a given port is the steamship service which is accorded it, since, if the steamer service is there, if the railroads are there, and if the rates are equal, the movement of commerce via one instead of another port must be occasioned by matters entirely unrelated to transportation.

To its *1927 report* the Commission attaches an appendix (R. 3433-6) dealing with this matter from which it concludes (R. 3380):

> "These tables indicate that measured by the net tonnage and the number of vessels entered and cleared the Galveston district has progressed somewhat faster than the New Orleans district."

Commissioner Hall, in dissenting from the *1927 report* as to the conclusion to be reached, although not as to the evidentiary facts, says (R. 3431):

> "In the case before us there is no persuasive showing that the Texas ports have had a less healthy development of traffic than New Orleans for example. Considered as a whole, they have gained far more than New Orleans, both in percentage and in total tonnage."

We do not, however, rest our case under this proposition upon the fact that, according to the Commission's findings, the Texas ports have had a greater success than New Orleans, even under the equalized rate structure. Admitting, for the sake of the argument, that the Texas ports had not enjoyed their phenomenal growth, we would still argue that their right to an increase in steamship service and to a greater number of cars being interchanged in their facilities between rail and ocean lines is not superior, but on the contrary is subordinate, to the right of the carriers serving New Orleans to compete as a part of a through route for traffic transported between inland points and foreign points.

In making this point it is to be emphasized that the traffic here involved is not domestic traffic which has either origin or destination at the points alleged to be preferred and prejudiced. It is export, import and coastwise traffic, in respect of which the ports are but junction points on through routes.

In respect of rates applicable to such traffic, we respectfully assert that a correct construction of Section 3 requires this Court to say: The charging of the same export, import and coastwise rates for the longer hauls to and from New Orleans than are contemporaneously charged for shorter hauls to and from the Texas ports does not occasion preference and prejudice which is undue, nor does there result therefrom any violation of the Act *provided* (1) the rates to and from the nearer ports are not unreasonably high and excessive, and (2) the equalized rates to the more distant port are not unreasonably low so as to cast a burden on other traffic, and (3) the equalized rate structure is necessitated by real and compelling competition between competing rail-and-ocean routes upon which the ports are but junction points between rail and ocean carriers.

If the proposition just advanced is sound, there was no violation of law which necessitated the Commission's exercising any of its powers under Section 15, and, consequently, the lower court should have enjoined the orders.

It cannot be denied the three provisos stated are true and correct. As to No. 1, there was no complaint that the assailed rates to the nearer ports were excessive and unreasonable. In fact, the Commission specifically found in its *1929 report* that the assailed rates to the Texas ports were generally the same or lower than the maximum reasonable rates heretofore prescribed by the Commission. (R. 3452.)

As to proviso No. 2, we have the specific finding of the Commission in the *1925 report* that there was no evidence

to show that the equalized rates to New Orleans were so low as to cast a burden on other traffic. (R. 3353.)

Coming to No. 3, it is clear that competition between competing ocean-and-rail routes compelled the equalization. That fact is so abundantly supported of record that, in the *1927 report*, we have the Commission finding that the prescription of differentials would, in time, divert to the route through the Texas ports that traffic which was then free to move over the route via New Orleans under equalized rates. (R. 3388.)

The testimony of Vice-President Payne, the chief traffic officer of the Texas & Pacific Railroad, was conclusive on the point that, without port equalization, the Louisiana port lines could not hope to compete with the Texas port lines for import, export and coastwise traffic originating at or destined to interior points in differential territory. (R. 901-5, 1002.)

In an early case, *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 145 U. S. 263, 276, 36 L. Ed. 699, 703, Mr. Justice Brown, speaking for the Court, in describing the purposes of Section 3 of the Act, said:

> "It was not designed, however, to prevent competition between different roads."

It is exactly that purpose, however, which the Commission has attributed to Section 3 in the case at bar.

In fact, in its *1927 report* the Commission went so far as to make a finding to the effect that competition must be excluded from consideration in passing upon the issue of preference and prejudice, the Commission saying (R. 3415):

> "We find * * * that the competition relied upon by defendants herein is no justification for the resulting prejudice from and to the interior points referred to."

In *Interstate Commerce Commission* v. *Alabama M. R.*

Co., 168 U. S. 144, 164, 42 L. Ed. 414, 422, Mr. Justice Shiras, speaking for the Court, said:

> "In construing statutory provisions, forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable. *Denaby Main Colliery Company* v. *Manchester, S. & L. Rw. Co.*, L. R. 11 App. Cas. 97; *Phipps* v. *London & North Western Railway* (1892), 2 Q. B. 229."

In the same case this Court cited with approval *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 73 Fed. 409, where, at page 424, Clark, D. J., said:

> "It thus appears beyond question, without reference to further authorities, that, in every case where a difference in the rates between two points of shipment is the ground of complaint, a leading and important element in the determination of the question is that of competition or want of competition."

To the same effect see *Louisville & Nashville R. Co.* v. *Behlmer*, 175 U. S. 648, 44 L. Ed. 309, and *East Tennessee, Virginia & Georgia R. Co.* v. *Interstate Comerce Commission*, 181 U. S. 1, 45 L. Ed. 719.

The *Import Rate Case*, 162 U. S. 197, 40 L. Ed. 940, is also authority for the proposition we are here advancing, since, in that case, it was competition between one ocean-and-rail route and another ocean-and-rail route which led this Court to hold that the Commission exceeded its powers in finding the Texas & Pacific guilty of undue preference and prejudice in extending a remarkably lower basis of rates to import traffic than to domestic traffic moving between the same points.

In *Londonderry Port and Harbour Commissioners* v. *The Great Northern Ry. Co., (Ireland) et al.,* (1887), 5 Ry. & Can. Traf. Cas., 282, and *Dublin and Manchester Steamship Co.* v. *London and North-Western Ry. Co.,* (1912), 15 Ry. & Can. Traf. Cas., 88, discussed under our Point III above, we pointed out that in England, under circumstances similar to those involved in this case, it has been held that the equalization of inland rate factors does not occasion preference and prejudice which is undue in violation of the Act.

One remarkable thing about the instant case is the different attitude the Commission here took as regards the right of a carrier to make competitive rates and the attitude it has taken in cases involving the long-and-short-haul provision of the fourth section of the Act. While the fourth section deals specifically with the assessing of a greater charge for a shorter than a longer haul, the former being contained within the latter, that section amounts to no more than a specification by Congress of a particular sort of preference and prejudice which is prohibited. In administering the fourth section in the very territory involved in this case, and in respect of rates applied on the same commodities as are involved in this case, the Commission has accorded competing circuitous lines permission to apply over the circuitous line the same rate as applies over the short line, this from any given origin to any given destination within the territory, subject to the proviso that, where the short-line distance is less than 500 miles, the short-line rate shall not be equalized by a line which is more than 70 per cent circuitous, and, when the hauls are between 500 and 1,000 miles, shall not be equalized by a carrier which is more than 50 per cent circuitous. (*Oklahoma Corporation Commission* v. *A. & S. Ry. Co.,* 98 I. C. C., 183 involving cottonseed and cottonseed products, and *Oklahoma Cor-*

poration Commission v. *A. & S. Ry. Co.*, 101 I. C. C., 116, involving grain and grain products.)

The Commission accorded the carriers relief from the provisions of the fourth section in the cases cited so as to permit an equalization of rates via competing routes. If the same degree of equalization had been permitted in the instant case, there would have been no condemnation of the equalized rate structure, since the distances to New Orleans, in relation to the distances to Galveston, fall well within the limits provided in the fourth section orders above mentioned.

In its *1927 report* the Commission, however, found that the competitive situation in the instant case was different from that which obtained in the case where the fourth section relief had been permitted, the distinction, in the words of the Commission, being as follows (R. 3412):

> "There is a clear distinction between a situation under the fourth section, under which differences in distance over direct and circuitous routes are in effect disregarded, and a situation like the one before us. Where a circuitous route is permitted to meet a short-line rate, the latter rate exists in any event over the short route, and no locality or shipper is deprived of the benefit of location if longer routes are permitted to meet this competition and share in the traffic. Here we have quite a different question, namely, whether carriers which are responsible for the rates between common destinations or origin points and these rival ports can lawfully, under Section 3, discriminate between the ports by giving materially more service for the same charge to one than they give to the other."

In attempting this distinction the Commission indulged in two errors: In the first place, it treated what it referred to as rival ports as though they were either origins or destinations for the traffic involved. In fact, as has been so often stated, they are but junction points between rail

and ocean carriers, and if the Commission had not closed its eyes to the equality of ocean rates beyond the ports, it would have appreciated that, in so far as competition as between routes is concerned, we have a case which is on all fours with the fourth section cases cited.

Secondly, in addressing itself to the argument which we predicated on the equalization of rates permitted in fourth section cases, the Commission confined its attention solely to those involving a circuitous as against a direct line both serving the same origin and destination points. The Commission also, however, grants fourth section relief to permit the direct lines in one section of the country to meet the competition of direct lines serving another section to or from a common destination from or to a common origin.

That no violation of law is occasioned by such a situation has been recognized by this Court.

In *Louisville & Nashville R. Co.* v. *Behlmer*, 175 U. S. 648; 44 L. Ed. 309, this Court held that it was not unlawful for the rail carriers to maintain lower rates from Memphis, Tenn., to Charleston, S. C., than from Memphis to an intermediate point, the lower Charleston rate being necessitated by competition with rival routes. The commodity involved was hay. Two classes of competition were relied on: *First*, the competition of other lines of railroad from Memphis to Charleston, which did not serve the intermediate point Summerville, and, *Second*, the competition of rail and water routes from Chicago, New York and eastern points.

The appellee in that case argued that, while under prior decisions of this Court the competition of competing routes between the same origin and the same destination justified the maintenance of rates lower than to an intermediate point, yet the same force and effect could not be given to competi-

tion not originating at the initial point of carriage. This Court refused to find that any such distinction existed, and, speaking through Mr. Justice White, said (175 U. S. 671; 44 L. Ed. 318):

> "Indeed, if the distinction contended for were sound it would follow that the greater and more material competition would be without weight in determining whether a dissimilarity of circumstances and conditions existed, whilst the lesser competition would be potential for such purpose. And not only this, but if the distinction be applicable, only that competition which might deflect at the point of origin the traffic from one carrier to another would be within the purview of that portion of the 4th section now under consideration, and competition which was so great as to absolutely prevent the movement of the traffic, unless the lesser rate was exacted, would be outside of its operation."

In *I. & S. 2595, Meats and Packing-House Products*, 136 I. C. C. 651, 661-670, 675, the Commission authorized southwestern carriers, in respect of their rates on fresh meats and packing-house products, to maintain from southwestern producing points to Kansas City, Chicago and Mississippi River crossings rates via the direct lines as low as 75 per cent of the maximum reasonable rates prescribed in order to permit the interested carriers to transport these commodities from packing houses which would be removed to the northern points if the relief sought were denied.

Of even more importance, because it involved import and export rates, is the action of the Commission on *Fourth Section Application 2040, Export and Import Rates to and from South Atlantic and Gulf Ports*, 169 I. C. C. 13. In that case the Commission granted the direct lines serving the South Atlantic and Gulf ports permission to maintain rates which were as low as 65 per cent of maximum reasonable rates in order to compete with the North Atlantic

ports for import and export traffic moving from or to common points, such as Chicago, Illinois. In that case, because such rates were necessary in order to permit southeastern carriers to compete with northern carriers in respect of export and import traffic, the Commission permitted what might be termed a shrinkage of rates by the southeastern carriers much greater than any shrinkage in rates indulged in by the Louisiana port carriers under port equalization.

To take an extreme case, the rate prescribed by the Commission in *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.*, 98 I. C. C. 183, 263, on cottonseed cake and meal in the southwest for 500 miles was 34 cents, and such a rate is applied to Galveston from all points 500 miles distant therefrom. Assume that from a common origin it is twice as far to New Orleans, *i. e.*, 1,000 miles. For that distance the same case provided a maximum reasonable rate on cottonseed cake and meal of 44 cents. Port equalization in the example just cited would require the New Orleans lines to publish 77.5 per cent of the maximum reasonable rate for 1,000 miles, which is a decidedly less shrinkage, even in a situation more extreme than any exhibited by the facts of record, than the Commission permitted in the case of export and import rates in the case cited.

The case cited, involving an adjustment as between the South Atlantic and the North Atlantic ports, is particularly in point because there the North Atlantic ports were in opposition to the relief sought just as Galveston is in opposition to the port equalization in this case. Speaking of the carriers serving the northern ports, at page 40 the Commission said (italics ours):

> "They contend that the adjustment of rates proposed by the southern carriers would result in *undue preference* of the southern ports and *unduly prejudice* the North Atlantic ports."

And at page 43 the Commission said:

> "The north Atlantic ports join with the eastern carriers in opposing the rates proposed by the southern carriers. Generally speaking, the grounds for their opposition are the same as those presented by the eastern carriers as outlined above. They insist that advantages which they may enjoy in the handling of foreign commerce by reason of their natural location on the shorter routes between the interior territory and foreign ports, the density of their populations, and great industrial and commercial development, should not be impaired or destroyed by an abnormal adjustment of freight rates designed for the purpose of diverting the current of foreign trade from the north Atlantic through the southern ports.
>
> * * * * *
>
> All of them protest that the establishment of the proposed rates would be unduly prejudicial to them and unjustly preferential of the southern ports in violation of Section 3."

In that case, as here, the establishment of rates on import and export traffic lower than the normal basis was supported by the claim that the adjustment was necessary in order to permit competition by carriers participating in routes through the southern ports, the Commission saying at page 32:

> "The necessity of establishing an adjustment of rates which will enable foreign commerce to move freely through southern ports as well as through the north Atlantic ports from and to the interior territory is offered as the general justification for the relief prayed herein by all the carriers serving the southern ports."

In the case cited, which was decided subsequent to the instant case, the Commission found that it would not be unlawful for the southern carriers to shrink their export and import rates by as much as 35 per cent below a normal basis for the purpose of competing with the northern lines

and northern ports. If the Commission in this case had paid the same heed to the necessities of the Louisiana port rail carriers in competing with the Texas port carriers, it would not have condemned the equalization of New Orleans with Galveston.

However, as we pointed out above, in its *1927 report* the Commission found that competition afforded no justification for the equalized import, export and coastwise rate structure as between New Orleans and Galveston.

In conclusion on this point, we respectfully submit that, since the equalization of the Louisiana ports with the Texas ports was required because of competition between through ocean-and-rail routes, it could not, as a matter of law, occasion either preference or prejudice which is undue. Since there is no violation of law, there was no reason for the Commission to exercise any of the powers conferred upon it by Section 15, and therefore the orders sought to be enjoined are void and should be set aside.

V.

The Louisiana port carriers neither serve with their own rails any of the Texas ports, nor have they any controlling voice in fixing the level of the assailed rates thereto or therefrom; and the maintenance by them of the same rates on shipments of foreign and coastwise traffic from or to interior points on their line to or from the Louisiana ports served by them as are contemporaneously maintained on like traffic from or to the same interior points to or from the Texas ports by competing Texas port carriers, does not, as a matter of law, result in a violation of Section 3 of the Interstate Commerce Act.

The Commission in the 1929 order in this case, in attempting to control the rates of the Louisiana port carriers through the guise of the Section 3 order, alternative in form but not in fact, transcended the legitimate bounds of its authority and therefore the order is void and should be enjoined.

The questions to be argued under the above headings relate solely to the validity of the *1929 order*, and particularly to our contention that the Commission placed an erroneous construction upon Section 3 of the Act when it held that the Louisiana port carriers are amenable thereto, in so far as the relation of rates between points on their own lines to the rates maintained by other carriers between other points is concerned. The issue here is entirely one of law, there being no controversy as to the facts.

THE FACTS.

In the *1927 report* the Commission found that the Texas & Pacific and the Louisiana Railway & Navigation System could not be held guilty of undue preference or prejudice under the circumstances of this case because they "do not serve any Texas ports and have no controlling voice in fixing the level of the assailed rates to any of the Texas ports." (R. 3406.)

In the *1929 report* the Commission came to a different conclusion as a matter of law. It did not set aside or modify its previous finding of fact as to lack of control over the rates to the Texas ports. It did hold that the Louisiana port lines were subject to Section 3 of the Act in respect of export, import and coastwise rates maintained by them between the Louisiana ports and points on their own lines, irrespective of the admitted lack of control over the alleged prejudicial rates to and from Texas ports.

We thus start out with a specific finding by the Commission that the lines which maintain the rates which are alleged to be unduly preferential are not responsible for, nor do they have any control over, the rates alleged to be prejudicial.

This finding is abundantly supported by the evidence of record, particularly by the evidence given by witnesses on behalf of the Texas port lines which supported the complainants before the Commission. That evidence shows that the Texas port lines initially determined and were at all times responsible for and in control of the rates to and from the Texas ports, to the exclusion of the Louisiana port lines.

Obviously, the Louisiana port lines are solely in control of rates between points on their own lines and the Louisiana ports also served by them.

Under such circumstances, although the *1929 order* is alternative in form, it actually affords no real alternative. (The *1929 order* is reproduced on pages 87 to 92 of the printed record.) The Texas port lines have only one means of establishing the required differentials, that is, by reducing rates from points on their lines to the Texas ports, since it is not within their power to increase rates between points on the lines of the Louisiana port carriers. The Louisiana port carriers, on the other hand, have in turn but one method of accomplishing the required differentials, and that is by increases in rates, since obviously, it is not within their power to require the Santa Fe or the Missouri-Kansas-Texas Railroad to reduce rates between points located on the lines of the latter carriers.

Because this matter of control over and responsibility for rates is of such large importance in determining the question of law here under consideration, we quote below the actual testimony as given by witnesses of the Texas port lines who do alone control the rates to the Texas ports alleged to be unduly prejudicial.

Witness Bothwell, of the Santa Fe Railroad, which supported the complainant before the Commission and is an appellee here, introduced numerous exhibits, of which B-15 (R. 3085) is representative, for the purpose of showing that the Texas & Pacific from points local on its line maintained rates to New Orleans lower than to Galveston, the example in that exhibit being the rate on cottonseed cake from Forney, Texas, of 25 cents to New Orleans and 27 cents to Galveston. The occasion for this situation is explained by the Commission in its *1929 report* as resulting from equalization by the Texas & Pacific of New Orleans with *Houston*, Houston taking a lower rate basis than Galveston, and by the further fact that the long-and-short haul provision of the fourth section required the Texas & Pacific to main-

tain the Dallas-New Orleans rate, which was also the Dallas-Houston rate, as a maximum at intermediate points to the east thereof, such as Forney, even though such points might take a higher rate than from Dallas to Houston. (R. 3444-5.) As to whether or not the Texas & Pacific, having established the rates to New Orleans which in the judgment of its traffic officials were proper, had any control or not over rates to Galveston, then higher than the New Orleans rate, the following testimony of witness Bothwell, of the Santa Fe Railroad, is illuminating (R. 3089):

> "I also wish to state for the Commission's consideration in connection with Exhibits Nos. B-15 and B-16 that the Texas & Pacific and Louisiana Railway & Navigation Company actually did propose that no higher rates on certain commodities should apply from points on those lines to Galveston than such lines maintain to New Orleans, but the Texas port lines flatly refused to join."

The same witness further testified (R. 3105):

> "The Santa Fe and Katy cannot reduce rates from Oklahoma to New Orleans or other Louisiana ports without the concurrence of the lines serving such ports nor could the Texas & Pacific or Louisiana Railway & Navigation Company reduce the rates from the Texas points shown in this exhibit via the Santa Fe or Katy to Galveston without the concurrence of those lines, but we are powerless to stop them from increasing the rates to Texas ports, and likewise are powerless to force them to reduce their rates in the event they do not elect to do so."

Parenthetically, note that the witness emphasizes that the Texas & Pacific could require an *increase* in rates from points on its lines to the Texas ports. That fact is entirely beside the point, however, since to exercise the alternative of establishing the prescribed differentials by reducing the unduly prejudicial rates the Texas & Pacific must be in a position to *reduce* rates to the Texas ports.

Further, upon cross-examination by counsel for the Texas & Pacific, Witness Bothwell testified (R. 3112):

> "I stated also that the Texas port lines flatly refused to agree to the proposal of the Texas & Pacific and Louisiana Railway Navigation Company to reduce the rates on cake and meal to Houston where lower rates to New Orleans are published. I offered some testimony on that. I stated that you could not reduce the rate from a point on your line via the Santa Fe without our concurrence."

And further (R. 3116):

> "I stated that the Texas & Pacific could not reduce a rate from a point on their railroad, in connection with the Santa Fe to Galveston or Houston, without our concurrence. * * * I think that is a proposition of law and also a custom observed by the railroad."

Witness Sparkes, testifying for the Missouri-Kansas-Texas, another line supporting the complainant before the Commission, and one of the appellees here, testified in regard to this same proposition as follows (R. 3143-4):

> "If the Texas & Pacific want to observe their present rate to New Orleans as it is, and desire to put in a differential basis to Galveston, differentially under their present basis to New Orleans, I am sure they could not accomplish that sort of a rate change in connection with our line. * * *."

To make this matter absolutely clear, Witness Sparkes was interrogated about a specific situation, the illustration taken being rates from Denton and Whitesboro, Texas, two junction points located both on the lines of the Texas & Pacific and the Missouri-Kansas-Texas. The rate on cottonseed cake from these points to Houston, as published direct by the Missouri-Kansas-Texas and also as a joint rate of the Texas & Pacific with the Missouri-Kansas-Texas, is 28 cents, and the Texas & Pacific publishes the same rate to New Orleans. (R. 3146-7.)

Under the order of the Commission the minimum differ-

ential on cottonseed cake is 5 cents. The rate of the Missouri-Kansas-Texas to New Orleans from Denton is 37 cents, 9 cents over its rate to Houston, or 4 cents in excess of the minimum differential. Witness Sparkes was then asked a series of questions to this point: If the Commission issues an alternative order requiring a minimum 5-cent differential and the Texas & Pacific desires to continue its 28-cent rate to New Orleans, what would happen to the 28-cent rates to Houston, both via the Missouri-Kansas-Texas direct and via the joint route of the Texas & Pacific and the Missouri-Kansas-Texas. Witness Sparkes answered that such an order would require no reduction in the Missouri-Kansas-Texas own rate. (R. 3148.) That is obvious since the rate is already 9 cents below the rate which the Missouri-Kansas-Texas publishes to New Orleans.

He further replied, however, that his line would not join with the Texas & Pacific in reducing the rate over the joint route of the Texas & Pacific and Missouri-Kansas-Texas to Houston to any basis differentially less than the 28 cents, —and to make it perfectly clear the witness stated (R. 3148):

> "It is true that the only way the Texas and Pacific could comply with an alternative order issued against it with respect to these differentials would be to increase its rate to New Orleans over the present Galveston rate.
>
> Given the adjustment that I have shown in my exhibit and an order issued against the Texas and Pacific and all other defendants requiring the maintenance of a 5-cent minimum differential, I do not think there would be any other method by which the Texas and Pacific, from its junction points or local points on its lines could accomplish that differential other than by increasing its own rates to New Orleans so that the differential would result. They would have to increase them to the extent of the differential."

If more is needed on this question of fact, it will only be necessary to refer to the geographical location of the lines of railroad here under consideration.

The Texas and Pacific Railway and the Louisiana Railway and Navigation Company are east-and-west lines, operating between New Orleans and points in northern and western Texas. Their rails do not reach any of the Texas ports. The east-and-west lines of these carriers serving the port of New Orleans are intersected at numerous junctions by north-and-south lines leading from said junctions to the Texas ports. As the Commission found, in its *1929 decision* in this case, the population of these junction points in 1920 was 471,410 as compared with a total population of but 40,297 at purely local stations. (R. 3451-2.) For all practical purposes, the bulk of the traffic involved in this case, insofar as the point we are here making directed to the *1929 order* is concerned, originates at or is destined to such junction points. Since neither the Texas and Pacific nor the Louisiana Railway and Navigation Company have a line from such junction points to Texas ports, it is obvious they have no say in what are to be the rates between such points. The only carriers who have a voice in the making of such rates are the carriers serving the Texas ports.

It is true that the Texas and Pacific and Louisiana Railway and Navigation System join in a series of tariffs published by Agent Fonda, which name rates between such junction points and the Texas ports. Under such rates it is possible for traffic to move to the Texas ports, a part of the way over the Texas and Pacific, as for example: traffic originating on the Texas and Pacific at Dallas, moving thence westwardly over its line to Ft. Worth, at which point it would be delivered to the Santa Fe, for a south-bound movement to Galveston. Obviously, however, the Texas and Pacific, in respect of the rate applied on such traffic

can only publish what the direct Dallas-Galveston line decides would be a proper rate. Furthermore, traffic to or from such local points of the Louisiana port lines which are not junctions with the Texas port lines is trifling and insignificant. This is so because, as is stated in the finding of the Commission above mentioned, approximately 90 per cent of the total population on the Louisiana port lines is at points which are junctions with the Texas port lines. Consequently it may be fairly said that the participation of the Texas and Pacific in any Galveston rate is nominal participation only. Such participation falls far short of demonstrating that the Texas and Pacific has either control over, responsibility for, or voice in the Dallas-Galveston rate.

THE QUESTION OF LAW.

With these facts in mind, the question of law for determination is as to whether or not the Louisiana port carriers can be found guilty of undue prejudice to the Texas ports and undue preference to the Louisiana ports in violation of Section 3, because of the fact that they charge the same export rate to New Orleans from an interior point such as Dallas, Texas, as the Texas port lines charge for a lesser service from the same interior point to the Texas ports.

The propositions of law upon which we rely and which, if sound, establish that the Commission exceeded its statutory powers in finding the Louisiana port lines violate Section 3, are as follows:

1. A violation of Section 3 cannot inhere in a single rate. That section of the Act is aimed at the relationship of rates, and the matter of relationship requires consideration of at least two rates, one of which is alleged to be unduly prejudicial and the other of which is alleged to be unduly preferential. To take a concrete illustration, we must have a rate from Dallas to New Orleans and a rate

from Dallas to Galveston, and, in comparison, the rate from Dallas to New Orleans must be too low when tested by the Dallas-Galveston rate, or the rate from Dallas to Galveston must be too high when tested by the Dallas-New Orleans rate.

2. Furthermore, the alleged preference and prejudice *must flow from a common source*. In other words, the carrier to be found guilty of violating Section 3 must have the same measure of responsibility and control over the rate alleged to be unduly prejudicial as over the rate alleged to be unduly preferential.

3. The appropriate test for determining whether the preference and prejudice both flow from a common source, and whether the carrier sought to be found guilty is responsible for, and has control over, not only the preferential but also the prejudicial rate, is found in the answer to the following question: Can the guilty carrier correct the relationship found to be unlawful by alternative means, that is, either by increasing the rate found to be relatively too high, or by reducing the rate found to be relatively too low? Unless the guilty carrier, with an alternative order issued against it, is free to adopt either of these alternative means, it must follow that the alleged prejudice and preference do not flow from a common source, and that the carrier sought to be found guilty does not have such control over both the preferential and prejudicial rate as to be guilty of violating Section 3.

Let it be understood we are not urging that the order of the Commission under Section 3 must necessarily be in the alternative, although in passing we note that the orders of the Commission sought to be enjoined are, in fact, in that form. We appreciate that under Section 15 (1) of the Act, the Commission, upon finding a violation of Section 3, is authorized to prescribe minimum or maximum, or maxi-

mum and minimum rates, thus depriving a carrier of any opportunity, by alternative means, of correcting a relationship found to be improper. In this case, however, the Commission issued an order which is alternative in form.

We are to be understood as saying that, in order for Section 3 to be violated, the circumstances must be such that the carrier, if given its option, has an actual alternative.

After all, the question here for determination is confined solely to whether or not the appellants, under the circumstances of this case, violated Section 3 of the Interstate Commerce Act. The character of the order which the Commission has the power to issue, a violation once having been established, has no bearing at all upon the question of whether a violation existed. Manifestly, no corrective power whatsoever can be exercised in the absence of a proven violation of law.

That the three propositions just enunciated are sound, is evidenced by, (a) decisions of the English courts construing that section of the English Act which, in substance, is the same as Section 3 of the Interstate Commerce Act; (b) by all decisions of the Interstate Commerce Commission prior to the decision in this case, and (c) by numerous decisions of this Court.

THE ENGLISH CASES.

Section 3 (1) of the Interstate Commerce Act stands today exactly as when originally enacted on February 4, 1887, and reads:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any

particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The section just quoted was taken directly from Section 2 of the English Railway and Canal Traffic Act of 1854 (17 & 18 Vict. c. 31), except for the addition in the American Act of the word "locality," the English Act reading:

> "No such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

This appeal is the first case in this Court in which there is sought to be enjoined an order of the Commission which, resting solely on Section 3 of the Act, sought to require one independent trunk line to measure its rates between points on its own line by the rates controlled and maintained by a competing carrier between points on the line of the latter. Perhaps the question has not earlier arisen because, on the face of it, such action on the part of the Commission seems to be wholly beyond the bounds of common sense or reason. No exactly similar case has ever arisen in England. There are, however, numerous decisions of the English courts which make it plain that the English statute has always been construed in the manner in which we contend Section 3 of the Interstate Commerce Act should be construed.

These English cases are more than usually important because our Act is based directly upon the English Act, and in *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. Ed. 699, at page 284 of 145 U. S., and 706 of 36 L. Ed., this Court said:

> "But so far as relates to the question of 'undue preference,' it may be presumed that Congress, in adopting the language of the English Act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. *McDonald* v. *Hovey*, 110 U. S. 619."

The principle we find running all through the English cases is this: A carrier can not be guilty of undue preference unless it is also guilty of undue prejudice. The two must go hand in hand and the same carrier must be responsible for each. Unless there is a prejudice coupled with a preference there is no violation of the Act.

So, in the very early case of *Hozier* v. *Caledonian R. Co.* (1855), 17 Sess. Cas. 302, 1 Ry. & Can. Traf. Cas. 27, the Scotch Court of Sessions held that one who complained of a disparity in passenger fares must be in competition with the one alleged to receive the preferential treatment. Otherwise there was no coupling of preference with prejudice requisite to finding a violation of the law.

In *Caterham Railway Company* v. *London, Brighton and South Coast Ry. Co.* (1857), 87 E. C. L. R. 409, 1 C. B. (N. S.) 410, the Court found that assessing a higher charge from Caterham Junction to London than over another line for the same distance from Epsom to London did not constitute undue preference and prejudice.

In *Foreman* v. *Great Eastern Ry. Co.* (1875), 2 Ry. & Can. Traf. Cas. 202, was involved an allegation that the defendant was guilty of undue preference and prejudice because the rates applicable on different portions of its lines were not equally proportioned to the service rendered.

At page 206 the Court said:

> "As, however, the complainants do not, as far as their trade in Yarmouth itself is concerned, use the Great Eastern Railway at all, the company can not be said to prefer other traffic to theirs; nor does the Traffic

Act prevent a railway company from having special rates of charge to a terminus to which traffic can be carried by other routes or other modes of carriage with which theirs is in competition."

In *Richardson* v. *Midland Railway Co.* (1881), 4 Ry. & Can. Traf. Cas. 1, the Railway Commissioners required an adjustment of the local rates of the Midland Company on malt, barley and hops to Newark and Burton, in order to bring the rates thereto in conformity with the requirements of Section 2 of the English Act. The Commissioners emphasized, however, that their findings were confined to the local rates of the Midland Company, *that carrier serving both the locality alleged to be prejudiced and the locality alleged to be preferred*, and expressly disclaimed any intent to interfere with the through rates maintained to and from the same localities by other carriers.

In *Dublin Steam Packet Company* v. *London and North-Western Ry. Co.* (1881), 4 Ry. & Can. Traf. Cas. 10, it appeared that there were two routes for the transportation of passengers between the interior of England and the coast of Ireland, both via the port of Holyhead. The defendant, the London and North-Western Railway Company, operated the rail portion of both routes. The applicant steamer company operated steamers from Holyhead to Kingston and its route in connection with that of defendant was termed the mail route. The defendant also operated its own line of steamers between Holyhead and North Wall, in Dublin, called the North Wall route. The defendant railway not only controlled the rates of fare over its own North Wall route but by a sub-contract controlled the rates of fare over the route made up of its own line and applicant's line of steamers. The applicant complained because the rail defendant maintained lower rates via the North Wall route than applicant was authorized to maintain via the

mail route and thus diverted to the former route most of the business.

The Commissioners held that the difference in the through charges fixed by the London and North-Western Railway Company was out of proportion to the difference in service, and consequently in violation of Section 2 of the Railway and Canal Traffic Act, 1854. In emphasizing that as a condition precedent to this violation, the defendant rail carrier must be held responsible for both the rates involved, the Commissioners at page 18 said:

> "The effect of the provision in the sub-contract is to give to the North-Western Company, so far as fares are concerned, as complete control over both routes as if they were sole owners of both, and under these circumstances the provisions of the Traffic Act (which are made expressly applicable to both these steamers) apply to both routes precisely as if they formed part of a single system, and any inequality of terms which would constitute an undue preference in the one case would equally do so in the other."

From what was said it is apparent that, if the London and North-Western Company had not controlled the alleged prejudicial rates via the mail route as well as the alleged preferential rates via the North Wall route, no violation of the Act would have been found.

The above cases were all decided before Section 3 of our own Act was enacted. They show a construction of the English Act directly opposed to the construction of Section 3 which the Commission adopted in its *1929 report*. Some of the more recent English cases make this exceedingly plain.

In *Liverpool Corn Traders' Association* v. *Great Western Ry. Co.* (1892), 8 Ry. & Can. Traf. Cas., 114, a case involving alleged preference and prejudice as between ports, it was held that, although the same line of railroad served both ports, it would not be required to increase the

rate alleged to be unduly preferential in the face of a showing that such a rate was necessary to meet the competition of other forms of transportation, this case being a somewhat indirect application of what, in our subsequent discussion of the Commission's decision, is termed the *Ashland Fire Brick* doctrine.

Pickering Phipps v. *London and North-Western Ry. Co.* (1892), 8 Ry. & Can. Traf. Cas., 83, in which the Court had under consideration the construction of Section 2 of the English Act, is also authority for the proposition that there is no undue preference and prejudice unless the one alleged to be preferred and the one alleged to be prejudiced are both located on the same carrier, and unless that carrier is in a position to remove the preference and prejudice by alternative means.

For example, at page 107, Lord Herschell, in discussing the character of relief which might be given under that section said:

> "But under the Railway and Canal Traffic Act, as was pointed out in the House of Lords, the company have their option. They may put up one charge, they may put down the other."

In the same case Lindley, L. J., said:

> "The moment one of two traders on the *same* line finds that the other is being charged at a less rate than he is, he is entitled to say to the railway company: How do you justify that?"

emphasizing, it will be noted, that the same line must be responsible for the difference in charges.

Also in point is *Plymouth Incorporated Chamber of Commerce* v. *Great Western Ry. Co., et al.* (1895), 9 Ry. & Can. Traf. Cas., 72, in which a complaint was made because of the following situation: There were four principal harbors in the port of Plymouth, *i. e.*, Millbay Dock, Sutton Harbour, Stonehouse Pool and Cattewater. Each of

these four harbors was connected by railway, either directly or through junctions, with the railway systems of the two defendants, the Great Western Railway Company and the London & Southwestern Railway Company. Millbay Dock and Sutton Harbour were alleged to be preferred since they had lower rates than Stonehouse Pool and Cattewater. Millbay Dock was served exclusively by the Great Western Company. That company also served Sutton Harbour as did the London & South Western Railway Company. The two harbors alleged to be prejudiced by the higher rates, Stonehouse Pool and Cattewater, were served exclusively by the London & Southwestern Company, just as in this case Galveston is served exclusively by the Santa Fe and other Texas port lines.

The Great Western, the principal defendant, pointed out that it could not reach the points alleged to be prejudiced, *i. e.*, Stonehouse Pool or Cattewater Harbour, with its own line, but that the London & South Western also participated in that transportation and their services had to be taken care of out of the total rate. This was given in explanation for the higher rates from the harbors alleged to be prejudiced.

The Court held very specifically that the charge of undue preference and prejudice could not be maintained because a single carrier was not responsible for both the alleged prejudicial rates as well as the alleged preferential rates. Sir Frederick Peel said in substance, on page 82, that the charges of the London & South-Western, which did not serve all the ports, could not be limited by the charges which some other carrier might make at other ports, and at page 85, Lord Cobham said:

> "So far as regards the charge of undue preference against the Great Western Railway company, on the ground that the through rates to and from Cattewater and Stonehouse Pool to Great Western stations within

> 40 miles from Plymouth are higher than the Great Western local rates to and from Millbay and Sutton Harbour, it seems to me that it cannot be sustained. The Great Western does not convey traffic to or from the South-Western ports, but merely exchanges it with the South-Western at Laira Junction or North Road as the case may be, and it cannot be held responsible for the South-Western share of the composite rate, the fixing of which is beyond its control."

In *Lever Brothers, Limited* v. *Midland Ry. Co.* (1909), 13 Ry. & Can. Traf. Cas. 301, the situation was as follows:

The applicant operated a soap works at Port Sunlight, where the goods originated over the line of the Cheshire Lines Committee and were subsequently handed over to the Midland Railway Company, the defendant, as a connecting carrier. Charges were assessed on such soap at the actual gross weight thereof. The Midland Railway Company also served Leeds, at which place was located Watson & Sons, competitors of the applicant. The defendant determined the charges on the soap of Watson on the basis of certain estimated weights which were less than their actual gross weights. Undue preference and prejudice was alleged to have resulted from these circumstances. The Midland Railway Company defended on the ground that the basis of determining charges for Watson was open to all shippers from Leeds, and that it could not be held guilty of preferring Watson to the prejudice of the applicant because it did not serve Port Sunlight. The Railway and Canal Commissioners sustained the position of the defendant, Mr. Justice Lawrence saying, at page 304:

> "This being the state of the evidence, it was objected by the defendants that no case of undue preference had been made out. It is certainly a startling case, for it seems, broadly stated, to be an attempt to make competition among railway companies impossible, by saying that the trader whose works are served by one railway company under less favourable terms than the works

> of his rival are served by some other railway company can penalize the company giving the more favourable terms by recovering the value of any difference in treatment as an undue prejudice to him or undue preference to his rival."

On appeal the decision of the Commissioners was affirmed, Vaughan Williams, L. J., saying, at page 312:

> "I agree with Lawrence, J., that it is not undue preference for a railway company to serve one of two traders in the same line of business on more favourable terms than his rival in trade is served by another railway company, and that to say that the trader whose goods are carried at the less favourable terms can penalize the company carrying his rival's goods on more favourable terms than the other railway by recovering the value of any difference in treatment would be to make competition amongst railways impossible."

Could it be made plainer that, if the situation here involved arose under the English Act, the Court, to paraphrase the language just quoted, would necessarily hold that it is not undue preference for the Texas & Pacific to serve New Orleans on more favorable terms than the competing port, Galveston, is served by the Santa Fe Railroad?

The Interstate Commerce Commission Cases.

To appreciate how far the Commission in this case departed from the construction of section 3 of the Act which it followed for more than 40 years, it is again necessary to state briefly the kind of a case which is here presented.

In the *1929 order* in this case the Commission finds that the Louisiana port lines are in violation of section 3 because of their failure, to take an illustrative case, to charge 5 cents more on export cottonseed cake from Dallas to New Orleans than the Santa Fe charges from Dallas to Galveston.

The matter dealt with was purely one of relationship

since no complaint was made that the Dallas-Galveston rate was too high, the complainants expressly excluding any such allegation from their complaint, (*1925 Report*, R. 3348) and the Commission specifically found that there was no evidence of record to show that any of the rates to New Orleans were so low as to throw a burden on other traffic. (*1925 Report*, R. 3353.)

In short, the rates of the rail carriers serving the Texas and Louisiana ports are made dependent, in so far as their *relative* rate level is concerned, upon the rates maintained by competing carriers over which latter rates they have no control and for the measure of which they are not responsible.

Prior to the decision in this case, and beginning with the very first volume of the reported decisions, the Commission has held that in such a case it is without power to prescribe a given relationship by virtue of any authority conferred upon it by Section 3. Perhaps a more apt statement of the law is, that in such a case there is no violation of the Statute, and consequently no room for the Commission to exercise any of its regulatory powers. So in *Crews* v. *The Richmond & Danville R. R. Co.*, 1 I. C. C. 401, 415, Chairman Cooley, speaking for the Commission, said:

> "* * * railroad controversies and questions of rates * * * cannot be adjusted as they might be if all roads belonged to one system and were under a single control. * * * When intersecting roads are separately controlled and owned it may well happen that one which is of the very highest importance to the community it serves and which deals with them fairly, shall nevertheless be powerless to prevent the rates of other roads giving to some of its towns great advantage over others * * *."

Again in *Eau Claire Board of Trade* v. *C. M. & St. P. Ry. Co.*, 5 I. C. C. 264, 295, in which the facts as to control of rates were similar to those in the instant case, and in which

the Commission had under consideration the proper construction for the terms "undue preference and prejudice" contained in section 3, Judge Knapp, speaking for the Commission, said:

> "All these terms imply comparison and the basis of comparison is wanting unless the rates compared are made by the same carrier."

In *Chicago Lumber & Coal Co.* v. *T. S. Ry. Co.*, 16 I. C. C. 323, 332, the law is thus stated (boldface ours):

> "Regarding the charge of discrimination because of higher rates on the lines west of the river than east thereof, it is only necessary to say that a carrier cannot discriminate within the meaning of the statute except as between those whom it serves or whom it may lawfully be required to serve. It is not guilty of discrimination merely because it does not afford as favorable rates as others serving a different territory, though the products carried by each are brought to the same market. The law does not deal in these matters with all carriers collectively as a single unit or system, but **its commands are directed to each, with respect to the service which it is required to perform.**"

Among the earlier cases the one in which the question here presented was most thoroughly considered is *Ashland Fire Brick Co.* v. *S. Ry. Co.*, 22 I. C. C. 115. In so far as the Commission is concerned, this is undoubtedly the leading case on the question and has been cited in support of the contention we are now making scores of times.

In that case complainants manufacturing fire brick at Ashland and other points in eastern Kentucky complained under section 3 of the Act, because for a less distance to Birmingham they were charged 16 cents per hundred pounds while their competitors located at St. Louis for a longer distance were charged but 14 cents per hundred pounds.

The 14-cent rate from St. Louis to Birmingham had been

established by the St. Louis San Francisco Railroad operating west of the Mississippi River to Memphis, thence in an easterly direction to Birmingham. The same rate was also maintained by the Mobile & Ohio Railroad, which in operating from St. Louis to Birmingham crosses the Ohio River at Cairo. The 16-cent rate from Ashland was maintained by a combination of carriers making up the through route including the Chesapeake & Ohio, the Louisville & Nashville and the Southern Railway. A map on page 116 of 22 I. C. C. makes this geographical situation plain.

The Commission had no difficulty in finding that the St. Louis San Francisco Railroad and the Mobile & Ohio could not be held guilty of violating Section 3, since obviously they had no control over, nor were they responsible for, the Ashland-Birmingham rate.

In laying down this principle, the Commission observed that the St. Louis San Francisco Railroad, serving a distinct point of origin, put in low rates to Birmingham in order to be able to handle from St. Louis via its line traffic which theretofore had moved from Ashland via competing lines, saying, at page 119 (boldface ours):

> "For its own purposes as a competing line, and serving a distinct point of origin which desired access into the markets of the south, the Frisco road made these rates. This is a matter of traffic policy over which we have no control so long as the carrier adopting such policy does not discriminate as between communities. The figures given above abundantly show that the Birmingham district has almost exclusively drawn its supply of fire brick from the Kentucky and Ohio fields. The St. Louis plant desired access to the same district, and the Frisco accordingly made a rate which allowed them to have entrance thereto upon a preferential basis as against their eastern competitors. **It does not lie with this Commission to say that a carrier may not do this, nor can we reduce rates from other points because of such competition.**"

And again, at page 120:

"The Frisco and the Mobile & Ohio have through lines from St. Louis to Birmingham, the principal market in controversy here, and therefore control the rates for the full distance. The record in this case does not reveal that any of the traffic from St. Louis, as well as from Ashland, is delivered at any points of destination by carriers who are an essential part of the two through routes.

Wherever a like kind of traffic is transported from two similarly situated points of origin by the same carrier or carriers they may not discriminate between such points. That is to say, if the Chesapeake & Ohio, which alone serves Ashland, also had an exclusive line out of St. Louis it could not give to St. Louis a preferential rate. Furthermore, if the Louisville & Nashville alone delivered in Birmingham, participating in the two through routes and joint rates for both St. Louis and Ashland traffic it could not be a party to a preferential joint rate or proportional in favor of St. Louis. The test of the discrimination is the ability of one or the carriers participating in the two through routes from the two points of origin to the same point of destination to put an end to the discrimination by its own act. Hence we have said above that to give rise to discrimination between two points such as St. Louis and Ashland there must be one or more carriers participating in the discrimination that are necessary to the movement between the two points of origin and the destination—a carrier or carriers without which the through routes and rates could not be established or maintained."

To make plain the application of the *Ashland Fire Brick* doctrine to the case at bar, let us substitute the points and the lines of railroad here involved for those which were before the Commission in that case. We have here Dallas as the destination point in place of Birmingham. For the point alleged to be prejudicial and the lines serving it, we have Galveston, with the Santa Fe Railroad running to Dallas, in place of Ashland, with the Chesapeake & Ohio

and Louisville & Nashville running to Birmingham. For the point alleged to be preferred and the lines serving it, we have New Orleans, with the Texas & Pacific running to Dallas, in place of St. Louis with the St. Louis, San Francisco running to Birmingham. The geographical layout is identical with that which was before the Commission in the *Ashland Fire Brick Case*. Obviously, if the Commission had here followed the *Ashland Fire Brick* doctrine, it should have held in the *1929 report*, as it did in the *1927 report*, that the Louisiana port lines can not, as a matter of law, be held guilty of violating Section 3.

There was also another situation in the *Ashland Fire Brick* doctrine which merits attention. The complainants there called attention to the fact that the Louisville & Nashville, which was a part of the rate-making route from Ashland to Birmingham, also participated in the rate of 14 cents from St. Louis to Birmingham alleged to be preferential. It was, of course, obvious that, if the Louisville & Nashville alone be required to increase its rate from St. Louis to Birmingham, the complainants at Ashland would not benefit since the preferential rate would still be in effect via the lines of the Frisco and the Mobile & Ohio.

Under such circumstances the Commission held that the Louisville & Nashville could not be held guilty of violating section 3, and the following principle was enunciated (22 I. C. C. 120):

> "The test of the discrimination is the ability of one of the carriers participating in the two through routes from the two points of origin to the same point of destination to put an end to the discrimination by its own act."

The situation in the *Ashland Fire Brick case* in so far as the Louisville & Nashville is concerned is parallel to the situation involved in the *Cooper Grocery Company Case* order, which is also here sought to be enjoined.

In the *Cooper Grocery Company Case* complaint was made because of the following situation: The Louisiana port lines maintained from New Orleans to Dallas and Fort Worth, Texas, rates on imported green coffee of 48.5 cents per hundred pounds, these rates being the same as the Texas port lines maintained from Galveston to Dallas and Fort Worth. Other lines of railroad maintained from New Orleans to Waco, Texas, rate on imported green coffee of 57.5 cents per hundred pounds, reflecting the minimum differential of 9 cents over the Galveston-Waco rate. Waco is not located upon any of the carriers herein referred to as the Louisiana port lines, and the rate-making line from New Orleans thereto is the Texas-New Orleans Railroad Company.

Under the exemption granted in the *1927 report*, carriers other than the Texas & Pacific, operating between New Orleans and Dallas, were permitted to meet the rates made by the Texas & Pacific, the Commission saying (Rec., 3412):

> "If the parity in rates would in any event continue to exist by reason of the independent action of a carrier or carriers serving only one of the ports and responsible only for its rates, there would be the same justification for permitting the carriers which serve both New Orleans and one or more of the Texas ports to meet this competition as exists where we permit circuitous routes to meet short-line rates between the same points. This we find to be the situation as to points directly served by the Texas & Pacific and the Louisiana Railway & Navigation system."

In its *1929 order and report* the Commission departs from this phase of the *Ashland Firebrick* doctrine and finds preference of Dallas and prejudice of Waco despite the entire lack of responsibility for or control by any single carrier or group of carriers over the rates from New Orleans to both destinations.

The *Ashland Firebrick case* was cited and its doctrine

approved by this Court in *Central Railroad Co. of N. J.* v. *United States* (*The Creosoting Case*), 257 U. S. 247, 66 L. Ed. 217. The Commission, however, is apparently of the opinion that the doctrine was overthrown by this Court in *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515; 68 L. Ed. 417. This Court held, however, in *United States* v. *Illinois Central*, that its decision there was not inconsistent with the decision in the *Creosoting Case*.

While we will analyze both cases in some detail later, as well as the other cases cited by the Commission in support of its *1929 order*, at this time we would point out that every one of the Interstate Commerce Commission cases cited in the next paragraph were decided **subsequent** to the decision of this Court in *United States* v. *Illinois Central, supra*, and that in every one of such cases, until *the 1929 report* in this case, the Commission followed and applied without question the *Ashland Firebrick case* doctrine.

Such cases are as follows:

Wichita Motors Co. v. *A. & V. Ry. Co.*, 88 I. C. C. 152.

National Car Coupler Co. v. *B. & O. R. R. Co.*, 88 I. C. C. 325.

Valley Camp Coal Co. v. *B. & O. R. R. Co.*, 88 I. C. C. 682,

in which the Commission, at page 686, said:

> "It was not unduly prejudicial within the meaning of the interstate commerce act for defendant to charge more for hauls over its lines to Lorain than the other roads charged for hauls of similar length over their lines to other lake ports."

United Verde Extension Mining Co. v. *A. T. & S. F. Ry. Co.*, 89 I. C. C. 95.

Lake Dock Coal Cases, 89 I. C. C. 170.

Salt Cases of 1923, 92 I. C. C. 388.

Maritime Association of Boston Chamber of Commerce v. *A. A. R. R. Co.*, 95 I. C. C. 539.

Maxwell Motor Corp. v. *B. & O. R. R. Co.*, 100 I. C. C. 363.

Lake Cargo Coal Rates, 1925, 101 I. C. C. 513; 126 I. C. C. 309.

Union Bag & Paper Corp. v. *B. & M. R. R. Co.*, 104 I. C. C. 327.

Liquid Carbonic Co. v. *C. & E. R. R. Co.*, 104 I. C. C. 446.

Alabama Mining Institute v. *Illinois Central R. R. Co.*, 109 I. C. C. 740.

Case & Sons v. *Pennsylvania R. R. Co.*, 115 I. C. C. 694.

Fredonia Linseed Oil Works Co. v. *A. T. & S. F. Ry. Co.*, 122 I. C. C. 291.

Allen Mfg. Co. v. *A. G. S. R. R. Co.*, 126 I. C. C. 515.

Humble Oil & Refining Co. v. *B. S. L. & W. Ry. Co.*, 126 I. C. C. 717.

Republic Creosoting Co. v. *A. G. S. R. R. Co.*, 128 I. C. C. 547.

Iroquois Pulp & Paper Co. v. *A. A. R. R. Co.*, 128 I. C. C. 187.

Oklahoma Traffic Association v. *St. L. S. F. Ry. Co.*, 129 I. C. C. 461.

Washington Coal Producers Assn. v. *Union Pacific R. R. Co.*, 129 I. C. C. 499.

Armstrong Cork Co. v. *A. C. & Y. Ry. Co.*, 136 I. C. C. 9.

Holland Furnace Co. v. *B. & O. R. R. Co.*, 136 I. C. C. 479.

Federated Metals Corp. v. *Pa. R. R. Co.*, 144 I. C. C. 243.

Elliott Jones & Co. v. *A. & W. P. R. R. Co.*, 144 I. C. C. 374.

Terre Haute Chamber of Commerce v. *A. & W. Ry. Co.*, 147 I. C. C. 247.

Krupp Foundry Co. v. *Southern Ry. Co.*, 148 I. C. C. 743.

Cleveland Worsted Mills Co. v. *Pennsylvania R. R. Co.*, 152 I. C. C. 257.

Hallsboro Mfg. Co. v. *Atlantic C. L. R. Co.*, 157 I. C. C. 124.

The cases just cited are in addition to scores of earlier decisions in which the same doctrine was applied and followed. Among those just cited *Maritime Association of Boston Chamber of Commerce* v. *A. A. R. R. Co.*, 95 I. C. C. 539, is particularly important because that case also involved the relationship of rates as between different ports served by different carriers. In that case, decided a year subsequent to *United States* v. *Illinois Central*, *supra*, the Commission found that under circumstances as to railroad location and control of rates on all fours with the circumstances involved in the case at bar there could be no violation of section 3, the Commission saying at page 572:

> "A more serious objection is the fact that the New York Central, which is the rate-making line from Buffalo to Boston, is not the rate-making line from Buffalo to either Philadelphia or Baltimore. It cannot control the rates to those north Atlantic ports. Nor can the carriers which operate over the direct rate-making routes to Philadelphia or Baltimore control the rates from Buffalo to Boston. In such a situation it is claimed, and we think correctly, that it is impossible to find that defendants, or any of them, unduly prefer Baltimore and Philadelphia over Boston to the undue prejudice of the latter."

The *Boston Case* still stands in the books as the law of the land in respect of the adjustment at the north Atlantic ports although at the Gulf ports the Commission adopts an entirely different construction of the Act.

Another important case is the second decision in *Lake Cargo Coal Rates, 1925*, 126 I. C. C. 309, since in that case the complainants urged that the decision of this Court in *United States* v. *Illinois Central R. R. Co.* had overthrown

the *Ashland Firebrick* doctrine. That question was considered at some length by the Commission at pages 340 and 364 of its opinion, and rejected as untenable, the *Ashland Firebrick* doctrine again being followed.

When it came to the present case the Commission, however, decided that for more than 40 years it had been wrong in applying the principle of law for which we are contending.

It is appropriate to quote in full the words of the Commission in disposing of this issue in its *1929 report* (Rec., 3452-3455):

> "Under the doctrine announced in 1911 in *Ashland Fire Brick Co.* v. *S. Ry. Co.*, 22 I. C. C. 115, the test of discrimination under section 3 of the act is the ability of one of the carriers participating in both the prejudiced and the preferred traffic to put an end to the discrimination by its own act. This the New Orleans carriers which participate in this traffic to both the Louisiana and Texas ports, can do by increasing the rates to and from New Orleans. But it is contended for New Orleans that in order to be guilty of undue prejudice a carrier must control both the prejudicial and the preferential rate, because the method of removing the prejudice and preference must be left to the discretion of the carrier and the order requiring its removal must be in the alternative.* This proposition finds support in *Ashland Fire Brick Co.* v. *S. Ry.*

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* The Commission, because it apparently did not understand it, misstated in part our contention. It assumed our argument was directed to a lack of power to correct a proven violation of law. That assumption was unfounded since our point is that no violation of law exists, consequently the question of what corrective powers the Commission has is beside the point. We do not deny that, under an appropriate set of facts, the Commission may direct the method by which undue preference and prejudice is to be corrected, *i. e.*, by reducing the prejudicial or increasing the preferential rate. There is no question but that such a power is conferred by section 15 (1). Our point is that where the facts do not justify the specification of the method and the order is in form in the alternative, as it is in this case, the carrier must actually have a real alternative. If there is no real alternative, as there is not in this case since the Louisiana port lines have no control over rates to the Texas ports, then there is no proven violation of law and the order is void.

Co., supra, and subsequent cases, such as *Allen Mfg. Co.* v. *A. G. S. R. R. Co.*, 126 I. C. C. 515 and *Hallsboro Mfg. Co.* v. *Atlantic C. L. R. Co.*, 157 I. C. C. 124, wherein the doctrine of that case was applied under circumstances somewhat similar to those here before us. We take this occasion to review again our powers in this respect under the first paragraph of section 3 of the act in the light of recent decisions of the Supreme Court.

In *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, 356, that court said that the language of section 3 (1) 'is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn * * *. It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at.' In *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136, the court had before it our order requiring, among others, the St. Louis Southwestern, St. Louis, Iron Mountain & Southern, and Chicago, Rock Island & Pacific, referred to as the Cotton Belt, Iron Mountain, and Rock Island, respectively, to establish and maintain, either through Cairo, Ill., or Memphis, Tenn., a rate on lumber from points in the Southwest to Paducah, Ky., no higher than the rate then in effect to Cairo. The Cotton Belt and Iron Mountain hauled Paducah traffic up to Cairo and there turned it over to the Illinois Central for movement to Paducah. The Rock Island did not serve either Cairo or Paducah, but participated in traffic to both destinations. The Cotton Belt, Iron Mountain, and Rock Island urged that our order was void because 'since their rails did not reach Paducah they could not be guilty of discrimination against that point.' The court, in sustaining our order, said:

> 'They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose "rails" reach them.'

The order there sustained was directed against carriers two of which controlled the preferential rate but not the prejudicial rate, and one of which controlled neither, but all participated in the traffic to both destinations. Moreover, that order left no rate alternative with the carriers for it prescribed to Paducah the rate 'then in effect' to Cairo. That our order need not be in the alternative since the transportation act, 1920, is made clear in *York Mfrs. Asso.* v. *P. R. R. Co.*, 107 I. C. C. 219, 231. In *Central R. R. Co.* v. *United States*, 257 U. S. 247, the court said, 'Carriers can be held jointly and severally responsible for unjust discrimination if each carrier has participated in some way in that which causes the unjust discrimination.' And in *Chicago, I. & L. Ry.* v. *U. S.*, 270 U. S. 287, appears this clear statement of the law, 'wherever discrimination is, *in fact*, practiced, an order to remove it may issue; and the order may extend to *every carrier* who participates in inflicting the injury.' (Italics ours.) To the same effect is *United States* v. *Illinois Cent. R. R.*, 263 U. S. 515, wherein the court rejected the proposition that 'a carrier can not be held to have participated in an unjust discrimination unless it is a party both to the rate by which a preference has been given to others and to the higher rate which is given to the complainant,' and held that undue prejudice may be found against a carrier if it participated only in the rate which created the prejudice. The facts in the case chiefly discussed by the court in that opinion are too well known to require comment, but it is not so well known that by that opinion the court also disposed of an appeal from a decision of the United States District Court for the District of Wyoming dismissing a bill seeking to enjoin our order in *Pioneer Lumber Co.* v. *Director General*, 64 I. C. C. 485. In the latter case rates on lumber and lumber products from points in Idaho, Montana, and Washington to Ucross and Buffalo, Wyo., were found not unreasonable, but unduly prejudicial. Ucross and Buffalo are on the Wyoming Railway, a short line connecting with the Chicago, Burlington & Quincy at Clearmont, Wyo. The rates to the points on the short line were not joint rates, but combinations on Clearmont. The undue prejudice found consisted in the failure to apply to Ucross and Buffalo

a blanket rate on lumber which applied to Clearmont. The short line alone sought to set aside our order, but the court sustained it. There the short line found guilty of undue prejudice did not participate in the preferred traffic, and of course could not comply with the order by its own act.

The foregoing expressions by the Supreme Court leave no room for doubt that the construction of our powers under section 3 (1) of the act as announced in *Ashland Fire Brick Co.* v. *S. Ry. Co., supra*, is too narrow, and that in the situations before us in the instant cases we have the power to require the New Orleans carriers to remove the undue prejudice herein found to exist."

THE CASES IN THIS COURT.

The decisions in this Court, the Commission to the contrary, have been thoroughly consistent with the doctrine enunciated in the *Ashland Fire Brick* case, as well as consistent with the decisions of the English courts. In other words, this Court has also taken the view that there is no violation of Section 3 unless the particular carrier defendant is responsible for both the undue preference and the undue prejudice as alleged. So in *Penn Refining Co.* v. *Western New York & Pennsylvania R. R. Co.*, 208 U. S. 208, 52 L. Ed. 456, an order of the Commission under Section 3 was set aside as to the Lehigh Valley Railroad on the ground that that carrier was not responsible for both the alleged preference and prejudice.

In *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 56 L. Ed. 83, was set aside an order of the Commission finding the Union Pacific Railroad Company guilty of a violation of Section 3 in respect of allowances paid to elevator operators. In that case in the Circuit Court (*Peavey & Co.* v. *Union Pacific R. Co.*, 176 Fed. 409, 424, 425), it was urged that the difference between the allowance

paid at Omaha and the allowance paid at St. Louis constituted a violation of Section 3. The Circuit Court held that the fact that the Union Pacific did not reach St. Louis extracted "from this difference every element of unjust discrimination or undue prejudice." On this point this Court said (222 U. S. 48):

> "But, as remarked below, the Union Pacific could not be complained of on this ground."

In *East Tennessee V. & G. Ry. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 18, 45 L. Ed. 719, 725, this Court set aside an order of the Commission requiring the carriers to maintain no higher rates to Chattanooga than to Nashville, sustaining the contention of the carriers that the lines responsible for the preferential rates to Nashville were not responsible for the prejudicial rates to Chattanooga, Mr. Chief Justice White, speaking for the Court, saying:

> "The prohibition of the 3rd section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers."

We agree that to be responsible for both the prejudice and the preference it is not always necessary for the same carrier to serve both the point alleged to be preferred and the point alleged to be prejudiced. It is possible to have a case where a given carrier, or set of carriers, is entirely responsible both for the alleged preference and the alleged prejudice, although serving directly with its own rails, but one of the points involved.

This is illustrated by the following two cases, both of which are cited by the Commission. In *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136, 62 L. Ed. 199, the

order of the Commission required the defendants to publish rates to Paducah, Ky., not in excess of the rates from the same points or groups to Cairo, Illinois. The Commission had found discrimination against Paducah, and it was urged in this court that the order was void on the ground that since their rails did not reach Paducah they could not be guilty of discrimination against that city; the facts, however, were that the carriers by their *joint* action as this Court pointed out, had subjected Paducah to the payment of rates 6 cents higher than should properly have been put in effect and the order was sustained. The complete answer, however, to any contention that this decision of this Court sustained the right of the Commission to make an order against the Texas & Pacific in this case is found in the final two sentences of the opinion of this Court in that case where it said:

> "But the order is strictly one under Section 15 of the Act to Regulate Commerce to reduce existing through rates by establishing joint rates, or, in the alternative, to establish new through routes with joint rates. It is not primarily an order to remove discrimination in violation of Section 3."

There was no question of an order alternative in form, but not in fact, in the case immediately above cited. The order of the Commission required that the Cairo rate be published at Paducah. That fact rendered it unnecessary to inquire as to whether the defendants found guilty had it within their power to correct, by alternative means, the adjustment found unlawful. In other words, any inquiry as to what carrier had control of rates to both the prejudiced and preferred stations was beside the point.

In that case, inasmuch as the Paducah rate was found excessive and unreasonable to the extent it exceeded the Cairo rate, and consequently in violation of Section 1, there was no necessity for any finding whatsoever under Section

3. The Section 3 finding can be stricken out without changing in the slightest the effect of the decision or the order, and very obviously that is the view of the order which this Court entertained.

In *C. I. & L. Ry. Co.* v. *United States,* 270 U. S. 287, 292, 293, 70 L. Ed. 590, 594, also cited by the Commission, this Court sustained an order of the Commission under Section 3 which was predicated on the fact that three steam carriers at Michigan City refused to enter into interchange arrangements there with an electric line, this despite the fact that the steam carriers against whom the order was directed did not connect directly with that electric line but required, for the interchange of traffic, the service of an intermediate switching carrier. The decision of this Court rested on the fact that each of defendant steam roads was solely responsible not only for the alleged prejudice of refusing to maintain interchange arrangements with the electric line, but also for the alleged preference of contemporaneously maintaining interchange arrangements with other carriers at the same point, this Court saying at page 293 of 270 U. S., and 594 of 70 L. Ed.:

> "Here, each of the steam roads was an effective instrument of the discrimination complained of."

In other words, the defendant steam lines not only were guilty of preference but, because individually and collectively they refused to join with the electric line in an interchange arrangement, were responsible for and guilty of the prejudice. In this case it can not be contended that rates of the Santa Fe from Dallas to Galveston are held to their present level because of any action of the Texas & Pacific; consequently the Texas & Pacific is not an "effective instrument of the discrimination complained of," and can not be found guilty of the prejudice.

From the case just cited the Commission cites the following sentence as being a clear statement of the law:

> "Whenever discrimination is *in fact* practiced, an order to remove it may issue, and the order may extend to *every carrier* who participates in inflicting the injury."

We have no quarrel with the statement quoted as being an accurate statement of the law. Our quarrel is in the suggestion that the statement quoted is applicable to the facts in this case. We agree that if the Texas & Pacific had control over the rates of the Santa Fe from Dallas to Galveston, it would be participating in inflicting the injury. It is the lack of that control, however, which makes it necessary to find that the Texas & Pacific does not practice undue prejudice against Galveston, nor does it participate in the rates to Galveston to such an extent as to be held responsible for any injury which those rates may occasion.

In numerous cases involving Section 3 orders of the Commission, this Court has commented upon the fact that, under orders alternative in form, the carriers, found guilty, actually had an alternative as to how the preference and prejudice should be removed. Such an observation is found in the following cases at the pages indicated: *American Express Co.* v. *South Dakota*, 244 U. S. 617, 624, 61 L. Ed. 1352, 1357; *United States* v. *Pennsylvania R. R. Co.*, 266 U. S. 191, 69 L. Ed. 243; *C. I. & L. Ry. Co.* v. *United States*, 270 U. S. 287, 292, 293, 70 L. Ed. 590, 594, and *Minneapolis & St. L. R. R. Co.* v. *Peoria & Pekin Union R. Co.*, 270 U. S. 580, 582, 583, 70 L. Ed. 743, 745. See also *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 566; 63 L. Ed. 772 778.

In *Central Railroad Co. of N. J.* v. *United States*, 257 U. S. 247, 66 L. Ed. 217, the so-called *Creosoting Case*, this Court set aside a Section 3 order of the Commission on the ground that the carriers did not have the alternative of establishing creosoting privileges at the points alleged to be prejudiced or of withdrawing the creosoting privileges

at the points alleged to be preferred. In the case just cited the Commission in defending its order urged that the carriers found guilty of violating Section 3 did have an honest and real alternative but this Court said "the alleged alternative is illusory." In this case it may be fairly said that the participation of the New Orleans carriers in rates to and from Texas ports is either entirely absent, or is so nominal, that the alternative is illusory.

The legal significance of the facts in the *Creosoting Case* and in this case are so similar as to merit more than passing attention. The Central Railroad of New Jersey, referred to as the Central, and the Pennsylvania Railroad, being two of the twenty-three appellants in this Court, were complained of because of their failure to maintain a creosoting-in-transit privilege at Newark, N. J., while contemporaneously joining twenty-one southern and midwestern carriers in joint through rates which were subject to creosoting-in-transit privileges at other points. The Commission found the complaint well founded, and issued an order under Section 3 of the Act which was alternative in form, *i. e.*, which could be complied with either by the Central and the Pennsylvania establishing the privilege at Newark or by the southern and mid-western carriers, who were also respondents before the Commission and appellants in this Court, discontinuing the practice at points on their lines. In finding that the order was void because, while alternative in form it was not alternative in reality, this Court, speaking through Mr. Justice Brandeis said at pages 257 and 258 of 257 U. S. and 221 of 66 L. Ed.:

> "Twenty-one of the appellants are powerless either to cause the Central and the Pennsylvania to install the privilege at Newark or to cause the southern and mid-western carriers to discontinue the practice on their lines. The Central and the Pennsylvania are likewise powerless to cause these connecting carriers to

withdraw the privilege. They can, it is true, equalize conditions by establishing the privilege at Newark. But to do so would involve departure from a policy to which they have steadfastly adhered, and adhesion to which was held by the Commission not to be unreasonable."

The language just quoted, when paraphrased, is susceptible of exact application to the facts in this case. It would then read:

"The appellees are powerless to cause the Louisiana port lines to increase their rates to and from New Orleans; the Louisiana port lines are likewise powerless to cause the Texas port lines to reduce their rates to and from Galveston. They can, it is true, establish the differentials by such an increase in the rates to and from New Orleans but to do so would involve a departure from a policy to which they have steadfastly adhered and adhesion to which was held by the Commission not to result in rates so unreasonably low as to cast a burden on other traffic."

The Commission also cites the case immediately above, taking therefrom the following quotation:

"Carriers can be held jointly and severally responsible for unjust discrimination *only* if each carrier has participated in some way in that which causes the unjust discrimination."

In its quotation the Commission omitted the italicized word "only" thus materially changing the emphasis which this Court intended to convey.

We do not question the correctness of the principle, but we do contend it does not have that application to the facts of this case which the Commission supposed. We must have some test to determine whether or not a carrier has participated in *that which causes* the undue preference and prejudice. The test which we submit, believing it to be sound, is: Is the carrier, sought to be found guilty, responsible for and in control of both the prejudicial as well

as the preferential rate? If the answer to this question is "No," there exists no such participation in the discrimination as to bring the carrier within the purview of Section 3. It was because the answer to that question had to be "No" in the *Creosoting Case* that this Court there set aside a Section 3 order of the Commission, making it exceedingly plain that it was because the preference was controlled by one carrier and the prejudice by another carrier that neither could be found guilty of violating Section 3, this Court saying (italics ours):

> "What Congress sought to prevent by that section (Section 3) as originally enacted, was not differences between localities and transportation rates, facilities and privileges, but injust discrimination between them *by the same carrier or carriers.*"

We finally come to *United States* v. *Illinois Central R. Co.*, and *Wyoming R. R.* v. *United States*, 263 U. S. 515, 68 L. Ed. 417, upon which the Commission principally relies for the legality of the *1929 order* issued against the Louisiana port carriers and which was also cited in the opinion of the lower court. The force and effect of that decision require a careful analysis of what was before the Commission; otherwise there is a possibility of misapprehending just what was before this Court when it rendered its opinion therein.

In *United States* v. *Illinois Central R. Co., supra,* rail carriers sought to enjoin orders of the Commission requiring an extension of blanket rates on lumber from origins on independent short lines, the orders of the Commission being entered in *Swift Lumber Co.* v. *Fernwood & Gulf R. R. Co.*, 61 I. C. C. 485.

In *Wyoming Railway Co.* v. *United States, supra,* the Wyoming Railway Company sought to enjoin an order of the Commission requiring, under Section 3 of the Act, the extension to destinations on its line of the blanket rate on

lumber maintained from the Pacific coast, the order of the Commission being entered in *Pioneer Lumber Co.* v. *Director General,* 64 I. C. C. 485.

In both cases it appeared that it was the practice of the main trunk lines serving the territories involved to maintain extensive group rates on lumber, a common rate applying not only to and from their main line stations but also to and from stations on their own branch lines, and to the same extent to and from stations on independent branch lines located within the same general area.

Notwithstanding the wide extent of the rate groups, the trunk lines refused, entirely because of divisional disputes, to extend the blanket rate from origins on the Fernwood & Gulf in the *Swift Lumber Company* case and to destinations on the Wyoming Railway in *the Pioneer Lumber Company* case.

Manifestly, it was of no concern to either the Fernwood & Gulf or to the Wyoming Railroad whether or not points on their lines took the blanket rate or not, so long as they, by way of divisions, receive adequate revenue therefor. If the blanket rate were extended to such short lines and they were protected by way of appropriate divisions, as was their right under the law, it could only mean that the revenue to the main trunk lines would be somewhat diminished, these trunk lines being the Illinois Central in the *Swift Lumber Company Case* and the Chicago, Burlington & Quincy Railroad in the *Pioneer Lumber Company Case.*

Before the Commission, no one denied that the entire responsibility for the difference in treatment as between the points on the two independent short lines and other points within the general group was wholly upon the trunk lines. In fact, the Commission, in stating the question presented in the *Swift Lumber Company Case* said (61 I. C. C. 485, 490):

> "The fundamental issue is whether carriers which have equalized rates on lumber to certain destinations from all their main-line and branch-line points, and from points on certain independent short lines as well, which are located within a producing territory of wide extent may, without being guilty of undue prejudice, refuse to extend similar blanket rates to producing points within such territory which are located on other independent short lines."

And as to the reason why the Illinois Central in that case had refused to extend the blanket rate to the Fernwood & Gulf, the Commission at page 489 of its opinion said:

> "The Illinois Central states that it cannot afford to shrink its earnings by allowing larger divisions to the Fernwood & Gulf * * *."

Consequently, while the Fernwood & Gulf was a defendant before the Commission and was a party seeking the injunction of the Commission's order in this Court, the real carrier in interest in both proceedings was the Illinois Central, and as to that carrier it is clear that the rates alleged to be prejudicial, as well as the rates alleged to be preferential, were entirely within its control. This was recognized by this Court in saying, on page 521 of 263 U. S., and 424 of 68 L. Ed.:

> "The order leaves the carriers free to remove the discrimination either by making the Knoxo rate as low as that from Fernwood, or by raising the rate from Fernwood, or by giving both an intermediate rate."

Insofar as the Illinois Central-Fernwood & Gulf situation is concerned, we think the decision of this Court fairly shows nothing beyond a determination to deal with the substance of the case, which was the refusal of the Illinois Central to extend the blanket rate on the Fernwood & Gulf while contemporaneously maintaining the blanket rate from points on their branch and short lines. Both the decision of the Commission in the *Swift Lumber Company case* and the opinion of this Court show that the Fernwood & Gulf

was but an incident in the whole proceeding. There being such a difference in facts as between that case and this, we earnestly assert the Commission and the lower court were in error, in supposing that in the case cited this Court overturned the construction which the Commission had so long given to Section 3 of the Act.

Exactly the same situation, in so far as substance is concerned, was involved in the *Pioneer Lumber Company* case, 64 I. C. C. 485, except that the trunk line in that proceeding was the Chicago, Burlington & Quincy Railroad and except for the fact that that carrier not only held points on the Wyoming Railroad to a basis higher than the blanket rate but in fact refused to maintain any joint through rates with the short line whatsoever. This resulted in the traffic moving on a combination of the Wyoming Railroad Company's local rates and the rates of the Chicago, Burlington & Quincy to the junction point. That situation, however, was one for which the trunk line was solely responsible, as evidenced from the report of the Commission. On page 488 of its decision the Commission summarized the case made by complainants as follows:

> "Complainants contend that the fact that the defendants voluntarily apply the blanket rates to these points, and the further fact that defendants willingly maintain the extensive blanket, while refusing to extend blanket rates to points on the Wyoming result in undue prejudice."

And its general finding is thus expressed on page 489:

> "Since the trunk line carrier publishes the same blanket rate on lumber in carloads to destinations located over a considerable stretch of its main line and also extends that rate to points located on its branch lines a shipper situated on an independent branch line connecting with this blanketed stretch of the main line is entitled to the blanket rate, especially where the service over the independent branch line is not in excess

of the average service over the trunk line's own branches. It may be cheaper to perform a given service for equal distances to points located on a trunk line or on its branch lines than to points on an independent line. It is not cheaper for the Burlington to perform the service from Edgemont to Spearfish than for the Wyoming Company to perform the service from Clearmont to Buffalo. The mileage from Edgemont to Spearfish is over 4.5 times greater than that to Buffalo. Buffalo and Ucross are entitled to the blanket rates.

The question of divisions, and whether or not the Wyoming should receive its full local or only part thereof out of the blanket rate is not here in issue."

Very apparently, from what has just been quoted, the Commission treated the trunk lines as responsible not only for the preferential rates to points on their own line but also for the maintenance of the higher prejudicial rate to destinations on the Wyoming Railway. Having that view, which is the correct one, of the case, the Commission made this specific finding at page 490:

"* * * The failure of defendants to extend the blanket rates on lumber to Buffalo and Ucross on the line of the Wyoming Railway, while at the same time maintaining the blanket rates to other more distant points in the blanket territory on defendants' main and branch lines or on independent connecting lines, is and for the future will be unduly prejudicial."

It is true that in this Court the Wyoming Railroad alone appeared to oppose the order of the Commission, and this Court, in refusing to issue an injunction, said, at 527 of 263 U. S., and 426 of 68 L. Ed.:

"In No. 38, where the short line alone seeks to set aside the Commission's order, this additional fact requires mention. The rate to the short line points is not a joint rate, but a combination of the trunk line rate to the junction and the short line local rate. The distinction is without legal significance in this connection. A through route was established; and the trans-

> portation is performed as the result of this arrangement between the carriers, express or implied. Undue prejudice may be inflicted as effectively by a through rate which is a combination of locals, as by a joint through rate. The power of the Commission to remove the unjust discrimination exists in both classes of cases."

The case just cited means nothing more than that this Court refused to be deceived by mere matters of form, and insisted on looking at the substance of things. The substance was the refusal of the Chicago, Burlington & Quincy Railroad to extend a blanket adjustment to points on an independent short line. The trunk line exercised the real control over all the rates involved, both as to extending the blanket rate to points on its own lines, thus occasioning preference, and as to refusing to extend the blanket rate to points on the Wyoming Railroad, thus occasioning prejudice.

We have here, however, an entirely different case. The whole prejudice alleged, to use our representative example, is in the rate of the Santa Fe Railroad from Dallas to Galveston. None of the Louisiana port lines have the slightest voice in, responsibility for, or control over all or any portion of that rate alleged to be prejudicial so as to make it possible for them to reduce it in order to remove the prejudice. Under such circumstances, we present for determination a set of facts entirely different from those which were before the Commission or before this Court in *United States* v. *Illinois Central Railroad, supra.*

If this Court, in *United States* v. *Illinois Central*, meant to say that a carrier, which is not responsible for and not in control of both the rate alleged to be prejudicial and the rate alleged to be preferential, can nevertheless be held in violation of Section 3 of the Act, it must have reversed itself as to the principles of law announced in the *Creosot-*

ing Case. In *United States* v. *Illinois Central R. Co.*, Mr. Justice Brandeis, speaking for this Court, said specifically, however, that the finding there was not inconsistent with what this Court held in the *Creosoting Case;* and the *Creosoting Case*, as is elsewhere noted, cited with approval the decision of the Commission in the *Ashland Fire Brick Case.*

If this Court goes to the lengths necessary to support the *1929 order* of the Commission, it will have extended the powers of the Commission beyond any boundaries heretofore conceived of. If the Texas & Pacific can be required, under a Section 3 order, to adjust its rates in relation to the rates from Dallas to New Orleans according to the rates maintained by the Santa Fe from Dallas to Galveston, it will be equally possible, as a matter of law, to make the Dallas-New Orleans rate of the Texas & Pacific depend on the rate of the Louisville & Nashville from Birmingham to New Orleans, or on the rate of the Missouri-Kansas-Texas from Dallas to Kansas City, or on the rate of the Fort Worth & Denver City from Dallas to Denver.

Such relationships, however, can not be controlled by the Commission under Section 3 of the Act any more than the Commission could issue a Section 3 order which would require the Pennsylvania Railroad, from New York to Chicago, to adjust its charges in relation to the charges of the Burlington Railroad from Denver to Chicago.

To sustain the *1929 order*, this Court must announce a principle of law which will be so broad as to say that, under Section 3 of the Act, every carrier in the United States must fairly relate charges maintained to localities upon its line to the charges contemporaneously maintained by other independent carriers serving competing localities. In other words, preference need no longer go hand in hand with prejudice but they may be entirely separate and distinct things. Since Chicago and Omaha are both competing live

stock markets, it will become unduly preferential for the Union Pacific to maintain from points in Nebraska to Omaha charges which are lower, relatively, than the New York Central Railroad maintains from points in Indiana to Chicago. Since Section 3 prohibits undue prejudice as much as undue preference, it will, in the same situation, be unduly prejudicial for the New York Central to maintain to Chicago rates relatively higher than the Union Pacific maintains to Omaha.

That, however, would be an absurd result and is obviously beyond anything contemplated by the Congress when Section 3 was enacted.

In conclusion on this point, we present a query for which we must confess we know no answer: Assume, after the Commission entered the alternative order which we here seek to enjoin, that the Santa Fe announced that it elected to comply therewith by having the Texas & Pacific increase its rates between Dallas and New Orleans, and the Texas & Pacific, on its part, announced that it elected to comply therewith by having the Santa Fe reduce its local rates between Dallas and Galveston and by joining with the Santa Fe in reducing the joint rates of the Texas & Pacific and the Santa Fe between Dallas and Galveston; and further assume that an impasse is reached in that neither of these competing carriers will go along with the alternative method of removing the preference and prejudice suggested by its competitor; in such an event, which of these two carriers is subject to the penal provisions of Section 16 (4) of the Act because of its failure to obey the Commission's alternative order?

If an application be made to the courts for a writ of injunction, mandatory or otherwise, to compel obedience to the order under Section 16 (12) of the Act, against which of these carriers would it be proper to issue the writ and

which of the two rates involved should the Court require to be changed so as to provide the prescribed relationship?

We respectfully challenge the appellees to furnish an answer to these queries.

THE 1929 ORDER CAN NOT BE SUSTAINED AS THE EXERCISE BY THE COMMISSION OF ITS MINIMUM RATE POWERS SINCE IT IS NOT SUPPORTED BY THE SUBORDINATE FINDINGS NECESSARY TO JUSTIFY THE EXERCISE OF THAT POWER.

We appreciate that the Commission does have powers under which a carrier may be prevented from according a given locality rates which are so low as to cast a burden on other traffic and thus hamper the Commission in exercising the authority conferred upon it by Section 15 (a) of the Act. The point we are now making could not be sustained if the Commission had definitely exercised its minimum rate power for the purpose of protecting revenues generally in consonance with the letter and spirit of Section 15 (a). However, if the Commission were here exercising a minimum rate power, it would be necessary to support that finding by subordinate findings, setting out the circumstances which require its exercise. *Florida* v. *United States* (Florida Log Rate Case), 75 L. Ed. Adv. Ops. 212, 221; *Baltimore & O. R. Co.* v. *United States*, 277 U. S. 291, 72 L. Ed. 885; *Brimstone R. R. & Canal Co.* v. *United States*, 276 U. S. 104, 72 L. Ed. 487. No such subordinate findings are found in any of the reports of the Commission here sought to be enjoined. In fact, as we have earlier pointed out, in the *1925 report* the Commission specifically and definitely found that there is no evidence upon this record tending to show that any of the equalized rates to New Orleans are so low as to throw a burden on other traffic. (R. 3353.)

In neither of the subsequent reports was that finding set

aside or modified, and, until it is set aside, it definitely bars the way to any prescription of a minimum rate between points located on the lines of the Louisiana port carriers.

Perhaps what has just been said under this heading is beside the point since the Commission did not purport in its *1929 decision* to issue a minimum rate order or to specify the manner in which the preference and prejudice found should be removed. The order is alternative in form and it must stand or fall according to whether the Commission is right or wrong in the construction placed by it upon Section 3.

Because the Commission and the lower court erroneously construed the law, we respectfully submit that the *1929 order* must be set aside, irrespective of what this Court may do under the other assignments of error with the *1927 order*.

The appellants submit that the court below erred in the foregoing particulars, the decree of the lower court dismissing the bill is erroneous and should be reversed and the cause remanded to that court with instructions that it enjoin, set aside, annul and suspend the *1927* and *1929 orders* of the Commission, and each of them, in accordance with the prayers of the bills to enjoin.

Respectfully submitted,

LUTHER M. WALTER,
JOHN S. BURCHMORE,
NUEL D. BELNAP,

Attorneys for New Orleans Joint Traffic Bureau, Board of Trade of Kansas City, Mo., Grain Dealers Association of Oklahoma, Oklahoma Millers Association, The St. Joseph Grain Exchange, Omaha Grain Exchange, Atchison Board of Trade, Terrell Chamber of Commerce, and Monroe Traffic Bureau, Appellants.

September 12, 1931.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. [illegible]

THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA & ARKANSAS RAILWAY COMPANY, ET AL.,

Appellants,

versus

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

Appeal from the District Court of the United States of the Southern District of Texas.

Statement Adopting the Brief of the Texas & Pacific Railway Company as the Brief for Louisiana & Arkansas Railway Company, Louisiana Railway & Navigation Company and Louisiana Railway & Navigation Company of Texas, Appellants.

A. L. BURFORD,
R. E. MILLING, JR.,

Solicitors for Louisiana & Arkansas Railway Company, Louisiana Railway & Navigation Company, and Louisiana Railway & Navigation Company of Texas, Appellants.

Montgomery-Ardern Printing Co., Inc., 429-33 Charters, N. O., La.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1931.

No. 24

THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA & ARKANSAS RAILWAY COMPANY, ET AL.,

Appellants,

versus

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

Appeal from the District Court of the United States of the Southern District of Texas.

Statement Adopting the Brief of the Texas & Pacific Railway Company as the Brief for Louisiana & Arkansas Railway Company, Louisiana Railway & Navigation Company and Louisiana Railway & Navigation Company of Texas, Appellants.

May It Please the Court:

STATEMENT.

On February 11th, 1930, The Texas and Pacific Railway Company brought its action before a statutory court of three judges in the United States District Court

for the Southern District of Texas at Galveston, to annul the three orders of the Interstate Commerce Commission issued in cause No. 12798, as well as its orders in cause No. 20685. The suit of The Texas and Pacific Railway Company was docketed under No. 186 of the Equity Docket of the District Court. On March 7, 1930, a corresponding companion suit was brought before the same court by the Louisiana & Arkansas Railway Company, Louisiana Railway & Navigation Company and the Louisiana Railway & Navigation Company of Texas (the name of which last company has since been changed and now is Louisiana, Arkansas & Texas Railway Company [R. 3602]), which was docketed under Equity Docket No. 187, the bill in which companion suit contained substantially identical allegations and sought identical relief as that in the suit of The Texas and Pacific Railway Company. By order of the District Court of April 2, 1930 (R. 202), the two suits were consolidated and heard together, and were by one decree after hearing dismissed. (R. 3582). On appeal the consolidated causes have been docketed as one suit in this Court.

The Texas and Pacific Railway Company has filed in this Court a brief in conformity with the rules of practice adopted by this Court, setting forth the authorities and the arguments upon which it relies, which are the identical ones upon which these appellants also rely. We feel that it will serve no useful purpose to reiterate in an extended brief the authorities, arguments and things set out in the brief filed by our colleague, and accordingly these appellants, the Louisiana & Arkansas Railway, Louisiana Railway & Navigation Company and the Louisi-

ana, Arkansas & Texas Railway Company, with the full consent and approval of The Texas and Pacific Railway Company, adopt the brief of that appellant and ask this Honorable Court also to regard it as the brief of these appellants.

In this statement we will not do other than briefly refer to a few facts disclosed by the record which will acquaint the Court with the physical location of these appellants, pointing out some of the more serious detrimental effects which the orders of the Commission complained of in this case will necessarily have upon these appellants.

The Map Exhibit A-67 (reproduced as one of the stipulated exhibits in R. Vol VI) shows in red the location of the main line of the Louisiana Railway & Navigation Company extending from New Orleans northwesterly across the State of Louisiana, paralleling the Mississippi River and east thereof, crossing the Mississippi River at Baton Rouge and running thence northwesterly and passing through the City of Alexandria, to Shreveport, Louisiana. The map also shows the line of the Louisiana Railway & Navigation Company of Texas extending westerly from Shreveport across the state line between the States of Texas and Louisiana, and terminating at McKinney, somewhat north and slightly east of Dallas, in the heart of the differential territory created under the orders of the Interstate Commerce Commission which are attacked in this case. These lines generally parallel and lie north of the line of The Texas and Pacific Railway Company. (R. 1046, 1047). The main line of the Louisiana Railway & Navigation Company is 303.25 miles in length, and that of the Louisiana Railway & Navigation Company of Texas

206.08 miles in length, the combined length of the main lines of the two carriers being 508.33 miles. (R. 1060, 1061). The Louisiana Railway & Navigation Company property was constructed between the years 1897 and 1906 and was put into operation in the year 1906 (R. 1060). This property was constructed by Mr. William Edenborn and was by him owned and operated up until the year 1929. (R. 114). The line of the Louisiana Railway & Navigation Company of Texas was originally constructed and known as the SHERMAN-SHREVEPORT & SOUTHERN RAILWAY COMPANY and was for many years operated by the Missouri-Kansas & Texas Railway of Texas as the Shreveport Branch of that railroad. (R. 1061). In 1923 this Texas property was purchased at receiver's sale by Mr. William Edenborn, the then owner and operator of the Louisiana Railway & Navigation Company, and was thereafter operated by him as the Louisiana Railway & Navigation Company of Texas, the two properties being operated together with a view of forming a connection from New Orleans with the western roads connecting with the line in Texas, thus increasing the tonnage of import and export business through the port of New Orleans. (R. 1062). This acquisition of the Texas property and the unification of these properties into a line extending into the State of Texas took place following the first hearings before the Interstate Commerce Commission in the proceedings before that body that gave rise to this case. (R. 3409). The Commission in its report referred generally to these two lines, the Louisiana Railway & Navigation Company and the Louisiana Railway & Navigation of Texas, as the Louisiana Railway & Navigation System, and for the purposes of the case before the Interstate Commerce Commis-

sion, these two carriers were considered together as such. (R. 3416, 3442).

Subsequent to the entry of the last order of the Interstate Commerce Commission in Docket No. 12798 and prior to the filing of this suit in the District Court, the Louisiana & Arkansas Railway Company, under authority granted by the Interstate Commerce Commission in Finance Docket No. 7076, *(158 I. C. C. 477)* acquired by long time lease and stock purchase, the control and operation of the Louisiana Railway & Navigation Company, and, at the same time, the owners of the Louisiana & Arkansas Railway Company acquired the ownership and stock control of the Louisiana Railway & Navigation Company of Texas and have since operated the Louisiana Railway & Navigation Company of Texas (whose name has since been changed to Louisiana, Arkansas & Texas Railway Company) so that the operation of these properties continues as was the case at the time of the entry of the orders of the Interstate Commerce Commission assailed in this suit. (R. 114). Among the more important connections of the Texas lines are those at McKinney, Texas, with the Houston & Texas Central Railroad which extends into the differential territory to Sherman, Texas, north of McKinney; at Farmersville, Texas, with the Gulf, Colorado & Santa Fe, a part of the Santa Fe System, and serving the territory involved in the proceedings before the Commission, particularly in Texas, Oklahoma and Kansas and touching a great many of the more important shipping points in that territory; at Greenville, Texas, with the Missouri, Kansas & Texas Railway Company of Texas, the St. Louis Southwestern Railway and the Texas-Midland Railway

(now a branch of the Southern Pacific System), which lines serve the same territory; at Sulphur Springs, Texas, with the St. Louis, Southwestern Railway Company, or Cotton Belt System; at Jefferson, Texas, with The Texas and Pacific Railway Company and the Jefferson Northwestern Railway Company. At Shreveport, Louisiana, the Louisiana Railway & Navigation Company has connections with the Vicksburg, Shreveport & Pacific (now a part of the Illinois Central System), Southern Pacific Lines, Kansas City Southern and St. Louis & Southwestern, and at Alexandria, Louisiana, has connections with the Rock Island Line, the Texas & Pacific, the Southern Pacific Lines, and the Missouri Pacific Railroad Company, all of which connections give access to the differential territory involved in the proceedings. The Texas line has approximately fifteen (15) connections that handle the traffic to and from the so-called differential territory. The Louisiana Railway & Navigation Company of Louisiana has approximately ten (10) connections west of the Mississippi River that handle such traffic. (R. 1049-1051; Exhibit A-67).

The only Gulf port reached by the LOUISIANA RAILWAY & NAVIGATION SYSTEM is the city of New Orleans. It does not reach any of the Texas ports through branch lines and has no relationship with any of the lines serving the Texas ports. It has been the policy of this System to maintain such rates to New Orleans on all commodities from the so-called differential territory as would equalize the rates to the Texas ports established by the carriers serving those ports. (R. 1057).

The foregoing statement, and the map and evidence referred to, clearly indicate that the physical situation of

the Louisiana Railway & Navigation System, insofar as concerns its location, its connections, its access by its own line and through its connections to the differential territory, closely parallels, though not in all cases to as great an extent, the physical situation of The Texas and Pacific Railway Company and clearly indicates why all of the legal issues presented by The Texas and Pacific Railway Company in its brief (other than the issue raised by the claim that the Missouri Pacific Railroad Company controlled The Texas and Pacific Railway Company) and the authorities and arguments relied upon by it, are likewise in every respect applicable to the Louisiana Railway & Navigation System and why the Louisiana Railway & Navigation System adopts the brief of The Texas and Pacific Railway Company in this case and feels that it would serve no useful purpose to reiterate in a further brief.

The LOUISIANA & ARKANSAS RAILWAY COMPANY proper operates 302 miles of railroad in Arkansas and Louisiana, the main line extending from Hope, Arkansas, to Alexandria, Louisiana, a distance of 194 miles, with a line from Minden, Louisiana, to Shreveport of 30 miles, and from Packton to Vidalia, Louisiana, of 76 miles. (R. 1069). The lines of this carrier lie outside of the so-called differential territory and do not reach any of the Texas ports. Under its acquisition by long term lease of the line of the LOUISIANA RAILWAY & NAVIGATION COMPANY, it reaches over the rails of that carrier the port of New Orleans. The LOUISIANA & ARKANSAS RAILWAY COMPANY, through its connections, handles a large volume of export, import and coastwise traffic moving through the port of New Orleans,

and the policy of this carrier with regard to the equalization of ports is that the carriers should be permitted within their managerial discretion, to maintain such rates to the port of New Orleans on import, export and coastwise traffic as will equalize rates established by the carriers serving the Texas ports. (R. 1072).

The investment of the Louisiana Railway & Navigation Company, exclusive of the investment of the Louisiana Railway & Navigation Company of Texas, is shown to be $23,325,007.56. (R. 1063). Prior to the year 1925, the last year for which records were compiled, this carrier had consistently and for years operated at a large deficit, (R. 1063; 3410). The deficit for the year 1925, after all charges, was shown to be $419.334.74. Approximately fifty-five (55%) per cent. of the total of export and coastwise traffic handled by this line was shown to be traffic that would be affected by the differential orders of the Commission. (R. 1055). This company's proportion of the revenue from this traffic for the year 1925 was $152,929.12. (R. 1047). In the opinion of the witnesses of this carrier this loss in operating revenue would amount to approximately $300,000.00 per year (R. 1064) and the estimate as to the loss of revenues from export wheat alone, based on figures for a five year period, was shown to be $90,000.00 per year. (R. 1065). These figures are illustrative of the large revenues which will be lost to this carrier under the operation of the orders of the Commission.

In view of the testimony showing that the prime need of these carriers is additional traffic in order to overcome the operating deficits experienced, the statistics disclosed in the record and briefly referred to above, clearly

indicate that the effect of the orders in this case are so serious to this carrier as to severely endanger its ability to continue to operate as an efficient instrumentality of commerce. (R. 1066). Indeed, the Commission recognized that these considerations, with regard to the Louisiana Railway and Navigation System, merited special consideration. (R. 3410).

The foregoing statement is not intended as an exhaustive resume of the evidence and figures offered on the part of this carrier. We believe, however, that it is adequate for the purpose of bringing before this Court the grave situation which has resulted and will continue to result from the enforcing of the orders of the Interstate Commerce Commission which are attacked, and for the purpose of emphasizing the interest that these carriers have in the outcome of this case. If the managerial discretion of these carriers is limited or destroyed such that they will not be permitted to equalize with the rate to Texas ports, rates on export, import and coastwise traffic originating or destined to points on their lines and moving for export or import through the port of New Orleans, which is the only port that these lines reach or serve, and to join with their connections in the establishment of such equalized rates and thus meet existing competitive conditions by which means alone a fair share of this essential traffic can be secured to these carriers, the probability of future successful operation of these carriers will be highly prejudiced.

In conclusion, we join with the Texas and Pacific Railway Company, in the concluding paragraph of its brief which we adopt as our own, that since the orders of the Interstate Commerce Commission assailed herein transcend

the power and authority reposed in that tribunal and are both contrary to and unsupported by the evidence in many particulars, we submit that it devolves upon this Court to set aside by the decree of dismissal entered by the Court below and thereupon to remand the cause to that Court with instructions that it enjoin, set aside, annul and suspend such orders, and each of them, in accordance with the prayer of the respective petitions which are hereby brought forward and renewed.

Respectfully submitted,

A. L. BURFORD,
R. E. MILLING, JR.,
Solicitors for the Aforesaid Appellants.

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CHARLES ELMORE CRO
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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 1

THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA & ARKANSAS RAILWAY COMPANY, ET AL.,

Appellants.

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL.

Appeal From the United States District Court for the Southern District of Texas, Galveston Division.

BRIEF ON BEHALF OF THE LOUISIANA PUBLIC SERVICE COMMISSION.

Intervenor-Appellant.

EDWARD R. SCHOWALTER,
Solicitor for Louisiana Public Service Commission.

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 24.

THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA & ARKANSAS RAILWAY COMPANY, ET AL.,

Appellants.

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL.

Appeal From the United States District Court for the Southern District of Texas, Galveston Division.

BRIEF ON BEHALF OF THE LOUISIANA PUBLIC SERVICE COMMISSION.

May it please the Court:

The interest of the Louisiana Public Service Commission, intervenor-appellant herein, is substantially that of the intervenor New Orleans Joint Traffic Bureau.

In order that the time and labor of the Court may be conserved, therefore, the Louisiana Public Service Com-

mission, intervenor-appellant, adopts as its own the brief filed herein by the New Orleans Joint Traffic Bureau, intervenor, and respectfully prays that the relief therein sought be granted.

EDWARD R. SCHOWALTER,
Solicitor for Louisiana Public Service Commission, Intervenor-Appellant.

New Orleans, Louisiana,
September 11, 1931.